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No. _____

In the Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,
Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN R. CARTER
ATTORNEY GENERAL
GARY DAMON SECREST
DEPUTY ATTORNEY GENERAL
Counsel of Record
INDIANA GOVERNMENT CENTER SOUTH
5TH FLOOR
402 WEST WASHINGTON STREET
INDIANAPOLIS, IN 46204
(317) 232-6315

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

Younger v. Harris, 401 U.S. 37 (1971) , requires a federal court to abstain, absent "extraordinary circumstances," from enjoining an ongoing state judicial proceeding that involves an important state interest. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), established that *Younger* applies with equal force when the federal constitutional defense is an alleged violation of the Supremacy Clause, *i.e.*, preemption. Under *NOPSI*, the state interest must be defined *broadly* and, for abstention not to apply, the alleged preemption must at least be *"flagrant and patent," i.e.*, indisputable. The questions presented are:

1. Whether the principles of *Younger* and *NOPSI* are directly violated when the appellate court mandates issuance of an injunction based on its preliminary view that the state law "seems" to be preempted, without even addressing the federal statute *expressly reserving* state authority over the supposedly preempted activity and without mentioning the flagrant-and-patent standard.

2. Whether a federal court defies the principles of *Younger* and *NOPSI* when it rejects abstention based on an appellate *assumption* that regulatory commissioners are prosecuting state proceedings to serve the commercial interests of a private utility, rather than the state interests in utility service they have sworn to uphold and that have been recognized as "vital" in over eighty years of Supreme Court precedent.

3. Whether this Court's precedents forbid creating an exception to *Younger* under which a federal court may enjoin ongoing state proceedings whenever a federal agency has won the race to *assert* jurisdiction, even where that jurisdiction may not exist.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below include plaintiff Midwestern Gas Transmission Company, defendants William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, each in his or her official capacity as a Commissioner of the Indiana Utility Regulatory Commission, and defendant Southern Indiana Gas and Electric Company.

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William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner (the "Commissioners"), sued in their official capacities as Commissioners of the Indiana Utility Regulatory Commission (the "IURC"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 270 F.3d 536 (7th Cir. 2001), and is reproduced in App. A at 1a-8a. The opinion of the district court is reported at 120 F.Supp.2d 1155 (S.D. Ind. 2000), and is reproduced in App. B at 9a-67a.

JURISDICTION

The court of appeals entered its judgment on November 2, 2001. App. A, 1a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and involves these constitutional and statutory provisions:

The Supremacy Clause, Article VI, clause 2 of the Constitution, provides that "the Laws of the United States... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The federal Natural Gas Act (the "NGA") authorizes the Federal Energy Regulatory Commission ("FERC") to exercise jurisdiction, in relevant part, over "the transportation of natural gas in interstate commerce," but *not*

over "any other transportation or sale of natural gas," including "the local distribution of natural gas" or "the facilities used for such distribution." 15 U.S.C. § 717(b).

Indiana has long required a certificate of necessity from the IURC before a "gas utility" may render "gas distribution service" in Indiana. Ind. Code § 8-1-2-87(c). "Gas distribution service" means "the furnishing or sale of gas directly to any consumer within the state of Indiana for his or its domestic, commercial, or industrial use." Ind. Code § 8-1-2-87(a)(5). In 1985, Indiana also enacted statutes specifically addressing interstate pipeline companies that elect to enter the business of direct local gas distribution in Indiana. Indiana Code § 8-1-2-87.5(b)(1) requires a gas utility to "obtain a necessity certificate from the commission" before it may engage in the "transportation of gas from outside Indiana for direct . . . delivery to any end use consumer or consumers [in Indiana]."

STATEMENT

1. The Parties. Plaintiff Midwestern Gas Transmission Company ("Midwestern"), a "natural-gas company" under the NGA, 15 U.S.C. § 717a, owns an interstate gas pipeline which operates in four states, including Indiana, and is connected to the SIGECO distribution system. App. B, 14a. Midwestern contracted with two Indiana industrial gas consumers to provide both interstate transportation of gas and direct local delivery, the latter through distribution facilities built for this specific local purpose -- *i.e.*, not otherwise used for interstate transportation of gas. *Id.* at 12a. These two industrial consumers, Grain Processing Corporation ("GPC") and Scepter, Inc. ("Scepter"), purchase gas not from Midwestern, but from other sources outside Indiana. *Id.*

The IURC is an administrative body entrusted with interpretation and enforcement of Indiana utility laws. Ind. Code § 8-1-1-1. The Commissioners are appointed by the Governor of Indiana and each must take a written oath to "support and defend" the "laws of the State of Indiana." Ind. Code § 8-1-1-2.

The IURC has granted to Southern Indiana Gas and Electric Company ("SIGECO"), a local distribution company ("LDC"), a necessity certificate to sell and distribute natural gas solely *intra*state to end-use consumers in southwestern Indiana. MA 041; R. 34 at 4.[1] The facilities used by Midwestern to provide direct local gas delivery service to GPC and Scepter have been constructed within the geographic territory for which the IURC granted SIGECO a necessity certificate. App. B, 12a. An LDC must distribute gas to any customer within its territory who wishes to receive such service, even when the gas is purchased out of state and the LDC's role is limited to receiving gas from an interstate pipeline and providing local delivery service to the end user. The direct local delivery service by an interstate pipeline is often called a "bypass" of the LDC. Under Indiana law, the IURC may approve a bypass as an alternative to service by an LDC. The statutes do not express any preference for local delivery service by an LDC.

The IURC and its Commissioners are responsible for ensuring that public utilities in Indiana act in the "public interest" of the citizens of the State. Indiana Code § 8-1-2-115 mandates: "The commission shall inquire into any neglect or violation of the statutes of this state . . . by any

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[1] Record citations to materials not contained in petitioners' appendix are in the form used in the court of appeals and refer to sources available to respondents.

public utility . . . and it shall be its duty, to enforce" the statutes governing public utilities. Nothing is to "prevent[] the commission from instituting, prosecuting, hearing, or determining any investigation or proceeding which it is authorized to do, or make. . . ." Ind. Code § 8-1-1-5(d).

2. The IURC Proceedings. On June 11, 1998, the IURC began a proceeding targeting Midwestern's proposed local delivery service to GPC and Midwestern's failure to obtain a necessity certificate from the IURC. MA 091.[2]

Midwestern did not contest that it violated Indiana law. It moved to dismiss the IURC's proceedings on the ground that exclusive jurisdiction resided in FERC and that Indiana's authority to regulate direct local delivery service by pipelines, and the related distribution facilities, is preempted by the NGA. Midwestern initially asked the IURC to certify the jurisdictional issue to the Indiana Court of Appeals, but then withdrew that request when it obtained FERC approval in the permit proceedings described below. *Id.* Midwestern again moved the IURC to dismiss its proceedings in light of the permit it had obtained from FERC. The IURC denied that motion, but stayed further action while FERC considered petitions for rehearing and for reconsideration. MA 091-100.

The IURC has not closed or terminated its proceedings. As Midwestern acknowledged at the preliminary injunction hearing before the district court, the

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[2] In January 2000, two additional actions were initiated against Midwestern and Scepter, respectively, concerning Midwestern's local distribution of gas to Scepter and Scepter's construction and operation of intrastate transportation facilities for which no state approval was sought.

IURC remains "prepared to go forward" with those proceedings. SA 3-4.

3. The FERC Permit Proceedings. After privately contracting with GPC, Midwestern had filed, on May 12, 1998, a request that FERC approve its construction and operation of facilities for direct local gas distribution to GPC. *See In re Midwestern Gas Trans. Co.*, 85 FERC, ¶ 61,358 (Dec. 16, 1998). FERC issued an order providing the requested authorization to Midwestern. *Id.* Neither the IURC nor the Commissioners were parties to the FERC proceedings.[3]

4. The District Court Proceedings. In April 2000, Midwestern filed a complaint in the district court seeking to enjoin the ongoing IURC proceedings. The Commissioners moved to dismiss the complaint, arguing that *Younger* requires the district court to abstain and requires Midwestern to present to the IURC or the Indiana appellate courts any defense it has to the IURC's enforcement of state law. R. 35-36, 39-40. In November 2000, the district court dismissed the case, abstaining under *Younger*.

The district court held that the IURC proceedings satisfy each of the three requirements for *Younger* abstention. First, it found that the "state proceedings here plainly implicate important state interests, both generally in the regulation of natural gas and specifically in the regulation of bypass arrangements with industrial customers." App. B,

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[3] Midwestern filed on October 13, 1999, a request for FERC authorization for a connection to Scepter's intrastate transportation facilities. *See* 64 Fed. Reg. 57,635 (1999). Forty-five days later, Midwestern received automatic FERC authorization for that connection. *See* 18 C.F.R. § 157.205(i)(1). Again, neither the IURC nor the Commissioners were parties to this FERC proceeding.

26a. The district court relied on this Court's opinions in *General Motors Corp. v. Tracy*, 519 U.S. 278, 304-06 (1997) ("This Court has also recognized the importance of avoiding any jeopardy to service of the state-regulated captive market"), and in *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n,* 341 U.S. 329 (1951) ("*Panhandle-Michigan*") and *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507 (1947) ("*Panhandle-Indiana*") (both holding that states can exercise regulatory authority over bypass service, at least where a gas sale occurs with the local distribution service).

Second, the district court found that the IURC proceedings "are judicial in nature for purposes of *Younger* abstention." App. B, 30a. The district court noted that proceedings toward a permit or certificate of necessity, such as the Midwestern-GPC FERC proceeding, are generally "deemed legislative in nature," and that the "state enforcement proceedings" here are "judicial in nature" because they are "coercive," with the potential outcome being "appropriate penalties and enforcement mechanisms." *Id.* at 27a-30a.

Third, the district court observed that "state courts are fully capable of and responsible for interpreting and following the United States Constitution," *id.* at 30a, quoting this Court's statement in *Younger* that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U.S. at 45. The district court concluded that even if the IURC did not decide Midwestern's constitutional defenses, the IURC's ability to certify such questions of law to the Indiana appellate courts affords Midwestern a fully adequate forum. App. B, 31a-32a.

Having found that "the basic elements of *Younger* abstention are present in this case," the district court considered Midwestern's argument that this case fits an exception to *Younger* because the Indiana statutes were alleged to be "flagrantly and patently" preempted by the NGA. *Id.* at 32a-35a. The district court noted that the NGA was enacted "only to exercise federal jurisdiction over those aspects of the industry that the Court itself had held were not subject to state regulation," *id.* at 36a, and that the *Panhandle* cases, decided post-NGA, "involved bypass arrangements in which the same entity both sold and transported the gas in question directly to industrial customers." *Id.* at 39a. The district court observed that "FERC has concluded that the holdings and reasoning of the *Panhandle* cases do not extend to an interstate pipeline's" direct local delivery "so long as the pipeline company itself did not also sell the gas" -- that this direct local delivery and the facilities constructed for it are "interstate commerce" and not "local distribution" under the NGA when a retail sale is absent. *Id.* at 39a-40a. However, the district court found this conclusion conflicts with *Tracy*, in which this Court recognized the states' "substantial" public health and safety interests in this context, apart from the effects of gas sales, and noted the "predictable and disastrous" results in earlier times when "competitors built parallel delivery systems and continually tore up streets to do so." *Id.* at 48a & n.8, citing *Tracy*, 519 U.S. at 289-90 & n.5.

The district court addressed opinions by the Sixth, Tenth and District of Columbia Circuit Courts of Appeals, which agreed with FERC, but found them to be both unpersuasive and based on differing or inconsistent reasoning. *Id.* at 41a-45a. It also cited this Court's footnote in *Tracy* recognizing the decisions of the three circuit courts and stating: "We express no view on the correctness of these

decisions." *Id.* at 53a-54a, quoting 519 U.S. at n.14. The district court held that "in deciding whether *Younger* abstention is appropriate," the issue is not the "debate over regulatory jurisdiction" but "only whether the result of that debate is so clear that any effort by the Indiana Commission to exercise jurisdiction . . . would be 'flagrantly and patently' unconstitutional. . . . [T]hat question is easy to answer, and the answer is no." *Id.* at 59a.

5. The Court of Appeals' Decision. The Seventh Circuit reversed. It described section 1(b) of the NGA as meaning simply that FERC's "jurisdiction to regulate the interstate transportation of natural gas . . . is exclusive; state regulation is preempted." App. A, 4a. The court failed to address the NGA's express reservation of the states' regulatory power over "local distribution" of gas and over the "facilities" used for such distribution. It also disregarded this Court's analysis in the *Panhandle* cases and other cases holding that this power was reserved to the states even though it governs a portion of interstate transportation. *See, e.g., Panhandle-Michigan*, 341 U.S. at 333-34. The Seventh Circuit did not analyze or discuss the opinions on preemption by the Sixth, Tenth or District of Columbia Circuits, but cited them and said it "seems to us" these circuits were correct. App. A, 4a.

Later in its opinion, the court of appeals added that "the state here is not asserting a state interest; it is trying to take control of the interstate market in natural gas." *Id.* at 7a. The court said it could "see" the lack of state interest "more clearly" by examining SIGECO's presumed commercial motives for seeking state regulation, and accused the Commissioners of serving as SIGECO's tool "to limit interstate competition in the sale of natural gas." App. A, 7a.

The Seventh Circuit also declared that *Younger* "has no application to a case such as this" because there can be "no affront" to the states when "valid federal law has created a federal forum for the determination of issues that the state proceeding would be able to consider" and the "federal forum determines those issues" first. *Id.* at 3a. The court concluded that under its ruling any "disputant" -- which Midwestern asserts includes the Commissioners -- must "make his arguments in the first authorized forum to become seised of [the] dispute." *Id.* at 5a. The court did not mention that in disputes arising from a bypass situation, the first filing (by the pipeline company) will routinely be with FERC. Nor did the court state any legal theory under which the FERC proceeding, to which the IURC Commissioners were not parties, could bind the Commissioners or displace Indiana's ability to enforce its laws.

REASONS FOR GRANTING THE WRIT

I. The Opinion Below Directly Conflicts With *Younger* And *NOPSI*.

In *NOPSI*, this Court considered the application of *Younger* to a utility's request to enjoin a state court's review of state regulatory action that the utility claimed was preempted by the NGA. Two key principles of *NOPSI* are involved here:

First, *NOPSI* directs federal courts considering *Younger* abstention to focus on "the importance of the generic proceedings to the State," and *not* on the state's "interest in the *outcome* of the particular case." 491 U.S. at 365 (original emphasis). As an example, the Court said the relevant interest in *Younger* was not California's interest in prohibiting John Harris from distributing handbills, but that state's broader interest in enforcing its criminal laws. *Id.*

Second, the Court in *NOPSI* confirmed that a state enforcement action alleged to be *preempted* by federal law is on equal footing with state action alleged to violate any other constitutional guarantee. *Id.* Thus, the Court explicitly *rejected* the plaintiff's suggestion that "a district court presented with a preemption-based request for equitable relief should take a quick look at the merits; and if upon that look the claim appears substantial, the court should endeavor to resolve it." *Id.* at 364. The Court allowed only that "[p]erhaps" a "facially conclusive" claim that the underlying state proceeding is "flagrantly and patently violative of federal pre-emption" would establish irreparable injury and justify an exception to *Younger* abstention. *Id.* at 366-67.

A. The court of appeals' decision defies *NOPSI*'s requirement that the state interest be defined broadly, and substitutes its unsupported view of improper motive for the particular proceedings.

Defined in the broad terms counseled by this Court, the State's interest in the ongoing IURC proceedings is protecting the public health and welfare by enforcing state laws governing gas distribution to end users. As the Court stated in *NOPSI*, the "regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Id.* at 365, quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). *See also* Part II below. Under the correct standard, the legitimacy of Indiana's interest is beyond doubt.

Completely abandoning this doctrine of broad construction, the Seventh Circuit based its ruling on the narrow interest it perceived to be underlying the *particular* IURC proceedings Midwestern seeks to enjoin. Even more troubling, the court of appeals did not examine the *State's*

interest at all; it speculated about the presumed "interest" of the utility that reported the violations to the IURC: "SIGECO is seeking to enlist the State of Indiana in an effort to limit interstate competition in the sale of natural gas, specifically an effort to compel users of gas in SIGECO's market area to buy from a supplier contractually linked to SIGECO." App. A, 7a. This distorts the *Younger* analysis, and is factually incorrect. The district court noted the *undisputed* fact that "Midwestern's pipeline is also connected to the SIGECO distribution system," App. B, 14a, but the court of appeals declared that SIGECO did *not* receive gas from Midwestern and, with this error as its foundation, hypothesized that "[i]f SIGECO can persuade the Indiana commission to forbid Midwestern to deliver the gas, these purchasers will have to rescind their purchases and instead buy from an affiliate of one of the pipelines with which SIGECO has a contract." App. A, 7a. This imaginary motive is the stated basis of the Seventh Circuit's concern that the IURC is attempting to interfere with a national market for the *sale* of natural gas, from which the court indicts the IURC proceedings as being "vexatious" and "harassing." App. B, 6a, 8a. The court's analysis illustrates the dangers of allowing a court faced with a *Younger* abstention question to resolve the merits of preemption on a "quick look" before deciding whether to abstain.[4]

NOPSI forbids narrowly defining the State's interest in requiring application for a certificate of necessity by a pipeline that seeks to engage in local distribution activities. *NOPSI certainly* prohibits a court of appeals' rejection of *Younger* based on spurious accusations that state regulatory

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[4] The district court expressly found "no evidence of harassment or bad faith on the part of SIGECO, let alone the Indiana Commissioners." App. B, 33a.

Commissioners have abandoned their sworn duties to assist in obstruction of interstate commerce.

B. The Seventh Circuit's "seems preempted" exception would consume the rule and defeat the purposes of *Younger*.

NOPSI does not foreclose the possibility ("perhaps") of an exception to *Younger* in cases where the plaintiff can establish irreparable injury through a "facially conclusive" claim that the challenged state action or statute is "flagrantly and patently" unconstitutional (*i.e.*, in preemption cases, "flagrantly and patently" in conflict with a federal law). Ignoring this Court's careful efforts to limit the scope of such an exception, and compounding a problem that has arisen in other circuits, the Seventh Circuit has virtually eliminated *Younger* abstention in preemption cases.

1. The "seems to us" exception for preemption claims

The court of appeals' analysis of the preemption issue was limited to the following:

> The Natural Gas Act grants [FERC] jurisdiction to regulate the interstate transportation of natural gas, and the Supreme Court has held that [FERC's] jurisdiction is exclusive; state regulation is preempted. *It seems to us*, as it has seemed to the other courts to have addressed the issue, that the transportation of natural gas bought and produced out of state to Indiana residents via Midwestern's pipeline is interstate transportation rather than being intrastate

> transportation from, as it were, the purchasers to themselves.[5]

App.A, 4a (citations omitted) (emphasis supplied). Thus, the court of appeals adopted precisely the approach the Court rejected in *NOPSI*, 491 U.S. at 364-65: it took a "quick look at the merits" and "endeavor[ed] to resolve" the underlying preemption issue, rather than abstaining for resolution of this issue through state channels. This approach is a direct affront to state sovereignty.

2. The Seventh Circuit's expansion of other circuits' assault on the "flagrantly and patently" unconstitutional exception

Some courts have failed to recognize the subtle but crucial distinction between a litigant's *assertion* of "facial" or "clear" preemption and a "facially conclusive" showing that a state law or state agency action is "flagrantly and patently" preempted.[6] These opinions, now joined by the Seventh

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[5] The court of appeals also implied that Indiana's regulation might be preempted under the Natural Gas Policy Act of 1978 and/or the Natural Gas Wellhead Decontrol Act of 1989, both codified at 15 U.S.C. § 3301 *et seq*. These statutes deregulated *wellhead sales* of natural gas and do not affect state authority to regulate retail delivery of that commodity to the end-use consumer.

[6] The Fifth Circuit recognized and respected this distinction on remand of the *NOPSI* case, as ordered by this Court because it found abstention was not required where the state action was legislative. The Fifth Circuit noted that this Court "held only that the order was not 'flagrantly' unlawful for *Younger* abstention purposes" and that the question of whether the law was "facially" preempted remained undecided. 911 F.2d 993, 999 (5th Cir. 1990).

Circuit,[7] have diluted the *Younger* abstention doctrine in direct contravention of *NOPSI*. For example, the Third Circuit recently cited *NOPSI* for the proposition that when considering abstention the federal court's "focus" should be "on the *nature* of that claim. . . . abstention is inappropriate when a federal plaintiff asserts a preemption/Supremacy Clause claim." *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 108 (3d Cir. 1999) (original emphasis). The Sixth Circuit watered down *NOPSI*'s admonition that "what requires further factual inquiry can hardly be deemed 'flagrantly' unlawful for purposes of a threshold abstention determination," 491 U.S. at 367, when it interpreted *NOPSI* as suggesting that a federal court could avoid abstaining under *Younger* so long as no *factual findings* were required. *Norfolk & Western Ry. v. Pub. Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991). The First Circuit has noted that "[a] number of courts have held that *Younger* abstention is inappropriate where a claim of preemption is 'facially conclusive' or *'readily apparent.'*" *Chaulk Serv., Inc. v. Mass. Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995) (emphasis supplied). The Seventh Circuit has now lowered the bar to "seems preempted."

3. The Commissioners' actions are not "flagrantly" or "patently" preempted.

If this Court had invalidated a statute substantially similar to Ind. Code §8-1-2-87.5(b)(1), the IURC's proceedings might be "flagrantly and patently"

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[7] In *Younger*, the Court cautioned that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U.S. at 54. The Seventh Circuit's language demonstrates only that, in its opinion, the Indiana statute at issue is unconstitutional "on its face."

unconstitutional. If Congress had defined "local distribution" to *exclude* an interstate pipeline's direct delivery of natural gas to an end-use consumer as part of a retail transaction, Ind. Code §8-1-2-87.5(b)(1) might be "flagrantly and patently" unconstitutional. Beyond those circumstances of express, controlling authority, the alleged preemption should be blatant, undebatable, and such that no reasonable judge could disagree that Congress has preempted state authority. This is not such a case.

The Seventh Circuit's truncated disposition of the underlying preemption issue relies upon, and merely states general agreement with, the opinions of three other courts of appeals.[8] These three circuits are in conflict with precedent of this Court, and are so in conflict with one another that the Seventh Circuit cannot agree with them all. For example, the District of Columbia Circuit, in *Pub. Utilities Comm'n of California v. FERC*, 900 F.2d 269, 275-76 (D.C. Cir. 1990), refused to find that the Congressional grant of state jurisdiction over "local distribution" was "an independent limit on the grant of [FERC's] 'interstate transportation' jurisdiction," 900 F.2d at 275-76, despite this Court's recognition that states have regulatory authority over the final stage of natural gas transactions "*in interstate commerce*" because the activities regulated are "essentially local" and the regulation is necessary to protect important local or state interests. *Pennsylvania Gas Co. v. Pub. Serv. Comm'n*, 252

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[8] In *Tracy*, this Court acknowledged these circuit court opinions but "express[ed] no view on the correctness of these decisions." 519 U.S. at 306 n.14. Certainly the agreement (in result) of three or four circuits does not make the issue "clear"; this Court could, when squarely faced with this preemption issue, decide contrary to the heretofore unanimous courts of appeals. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001) (overturning the holdings of at least eight circuits).

U.S. 23, 28-30 (1920); *Panhandle-Indiana*, 332 U.S. at 522; *Panhandle-Michigan*, 341 U.S. at 333-34. The Tenth Circuit, on the other hand, acknowledged that Supreme Court precedent authorizes state regulation over portions of interstate commerce, stating "we cannot end our inquiry simply by recognizing that the matter involves transportation in interstate commerce."[9] *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417 (10th Cir. 1992). The District of Columbia Circuit also employed a mechanical "pressure test" for determining where "local distribution" begins, but that test was rejected by its Tenth Circuit counterpart, which declared, instead, that to perform "local distribution" the transporting entity must also be involved in the retail sale of the gas. *Compare* 900 F.2d 277 *with* 955 F.2d at 1420-21.

The Seventh Circuit does not adopt any of the tests proposed by the other circuit courts. In fact, the opinion below does not even mention the key disputed statutory term "local distribution."[10]

In contrast, the district court reviewed this Court's precedents upholding state regulation of "bypass arrangements in which the same entity both sold and transported the gas in question directly to industrial customers." App. B, 39a, citing *Panhandle-Indiana* and *Panhandle-Michigan*. It

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[9] This is precisely where the Seventh Circuit ended its inquiry. *See* App. A, 4a and Part I(B)(1), *supra*.

[10] The Sixth Circuit, in *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), at least addresses this provision before concluding that the pipeline's role in a bypass is "simply to transport [natural gas] from one state to another across several intervening states." It also ignored the key issue of the pipeline's direct delivery of the gas to an end-use consumer, in determining that the service at issue was not "local distribution."

reasoned that "the states' interests in regulating bypass arrangements . . . are not affected at all by a legal separation between the seller and the transporter." *Id.* at 47a. It found the Sixth, Tenth and District of Columbia Circuit opinions to be unpersuasive and based on inconsistent reasoning. *Id.* at 41a - 45a. Then, citing the words and purposes of *Younger*, the district court held: "The issue presented by Midwestern's argument is only whether the result of [the preemption] debate is so clear that any effort by the Indiana Commission to exercise jurisdiction over Midwestern's bypass arrangements with GPC and Scepter would be 'flagrantly and patently' unconstitutional . . . . [T]he answer is no." *Id.* at 59a.

II. The Seventh Circuit's Opinion Eviscerates Important State Interests This Court Has Recognized Repeatedly For More Than Eighty Years.

The Seventh Circuit's assertions that there can be "no state interest" in enforcing Indiana law inescapably contradict the wealth of Supreme Court precedent, in decisions from 1920 through 1997, recognizing the important state interests at stake in the regulation of utilities' local delivery service to end-use consumers, both residential and industrial. FERC is not responsible for the health and safety of local residents if the new facilities built by Midwestern (or Scepter) explode or leak. Similarly, local land use issues must not be subject to exclusive federal jurisdiction. FERC will not answer to Indiana voters unhappy about the unnecessary disruption caused by the installation of parallel natural gas delivery facilities. FERC will not assist the economically disadvantaged Indiana retail ratepayers. Indiana, and the Commissioners, must.

Before the NGA was enacted, in *Pennsylvania Gas*, 252 U.S. at 28, 30-31, the Court explained that state

regulation of local gas delivery service is "needed to protect or regulate matters of local interest" and that the "thing which the state commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers." In *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 309 (1924), the Court determined, "The business of supplying, on demand, local consumers is a local business, *even though the gas be brought from another state and drawn for distribution directly from interstate mains.*" (emphasis supplied).

When Congress enacted the NGA, it "was meticulous to take in only territory which this Court had held the states could not reach." *Panhandle-Michigan*, 341 U.S. at 335. After enactment of the NGA, the Court upheld the authority of a state commission to regulate an interstate pipeline's delivery service to an end-use consumer and described such service as an "'essentially local' concern and of vital interest to the State." *Panhandle-Michigan*, 341 U.S. at 334. In *Panhandle-Michigan*, the Court "emphasize[d] the need for local regulation" based on an interstate pipeline's proposed use of local streets and alleys and the impact on local utilities and consumers. *Id.* at 333. Similarly, the Court recognized in *Panhandle-Indiana* that "the state's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered" if these local regulatory interests were not recognized. 332 U.S. at 522.

This Court recently reiterated the crucial state interests supporting regulation of the local aspects of natural gas service to end users, *while expressly recognizing* the new "unbundled" competitive natural gas market in which industrial end users "buy natural gas from producers or independent marketers, pay interstate pipelines for interstate transportation, and pay LDCs for local transportation." *Tracy*, 519 U.S. at 284. The Court explained that the need

for state regulation was "learned from chastening experience that public streets could not be continually torn up to lay competitors' pipes," and " that investments in parallel delivery systems for different fractions of a local market would limit the value to consumers of any price competition." *Id.* at 290. The Court noted that Congress' enactment of the NGA "was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates *and service.*" *Id.* at 292. In fact, the Court in *Tracy* expressly acknowledged that the case before it -- in an "unbundled" context -- presented "circumstances remarkably similar" to those it had considered in *Panhandle-Michigan. Id.* at 305. The states' interests in the direct delivery of natural gas to end-use consumers are no less vital when the sale of gas is structured to occur in another state.

III. The Seventh Circuit's Erroneous Judgment Directly Invites Federal Agencies To Invade State Sovereignty And Will Have Broad And Recurring Harmful Effects.

In place of this Court's longstanding mandate that federal courts "restrain their authority because of 'scrupulous regard for the rightful independence of the state governments,'" *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941), the Seventh Circuit's judgment substitutes a policy of cavalier disregard for states' interests. In addition to its lax "seems preempted" standard and its second-guessing of presumed motive in the *particular* case, the court of appeals' opinion would sweep away the rights of state courts and agencies to decide the constitutionality of state laws whenever (1) there is a dispute as to the scope of federal and state regulatory authorities' jurisdiction over an activity; and (2) a federal agency claims jurisdiction when it becomes first "seised" of the dispute through a routine certification proceeding to which the state is *not* a party. The court of

appeals flatly declares that *Younger* "has no application" when the context is "dual federal-state jurisdiction over an activity" *no matter what powers Congress has reserved to the states*. Such an unsound rule would destroy the balance between federal and state authority in numerous contexts:

(a) The Seventh Circuit's "first filing" test would effectively displace and invalidate state laws with *no opportunity* for a state agency *or state courts* to decide the jurisdictional or constitutional issues. In cases such as this, FERC will virtually always receive the first filing because the context is a private deal struck by the pipeline, and FERC offers nearly routine approval with little or no consideration of local effects. As the district court held, there is "no support" for the "bold assertion that, in the dual federal-state system of regulating the natural gas business, state regulators must either intervene before FERC or passively and quietly accept FERC's decisions." App. B, 66a. Yet this is precisely what the Seventh Circuit's judgment requires.

(b) The race to the courthouse or agency door can no more grant jurisdiction to the first "seised" agency than such an agency could grant jurisdiction to itself. A federal "agency literally has *no power to act, let alone preempt the validly enacted legislation of a sovereign State*, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 373-74 (1986) (emphasis supplied). Certainly "an agency may not confer power upon itself" or "override" a "congressional *denial* of power" over intrastate or local service matters. *Id.* at 374-75.

(c) Last year this Court reversed the Seventh Circuit in *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001), and warned that state sovereignty must not be diminished by ignoring or minimizing federal statutory terms that define the

jurisdictional boundary. This Court expressed "heightened" concern for situations where an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. Yet here the Seventh Circuit has read Congress' "local distribution" reservation out of the NGA.

(d) Unless the IURC or the State of Indiana becomes a party to a dispute, neither the decisions of FERC nor the decisions of federal courts are binding upon them. *See Indiana Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993) ("Although U.S. Supreme Court decisions pertaining to federal questions are binding on state courts, lower federal court decisions" have "non-binding authority on state courts."). In other opinions, the Seventh Circuit has recognized that until the "Supreme Court of the United States has spoken, state courts are *not precluded from exercising their own judgment upon questions of federal law.*" *United States v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970). (emphasis supplied); *see also Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992). In this case it wrongly deprives state courts of the opportunity even to *consider* the federal constitutional validity of state laws.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Stephen R. Carter
Attorney General
Gary Damon Secrest
Deputy Attorney General
Counsel of Record
Indiana Government Center South,
5th Floor
402 West Washington Street
Indianapolis, Indiana 46204
(317) 232-6315

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-4340

[Filed November 2, 2001]

Midwestern Gas Transmission Company, *Plaintiff-Appellant*,	)
v.	)
William D. McCarty, et al., *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. 00 C 592
David F. Hamilton, Judge

JUDGES:
Before Posner, Ripple, and Kanne, Circuit Judges.

OPINION

Posner, *Circuit Judge*.

This is a suit by an interstate natural-gas pipeline, Midwestern, to enjoin the Southern Indiana Gas and Electric Company (SIGECO) from prosecuting an action before the Indiana Utility Regulatory Commission (IURC) and the Commission from entertaining the action. SIGECO seeks in that action a ruling that Midwestern must, pursuant to Ind. Code §§8-1-2-87, 87.5, obtain IURC's permission to connect its pipeline to two industrial users of gas in Indiana who purchased their gas from out of state sellers other than Midwestern but seek delivery of the gas from Midwestern, which has a pipeline close to these users. The Federal Energy Regulatory Commission (FERC) had approved the connection upon application by Midwestern in a proceeding that began prior to the proceeding initiated by SIGECO before the Indiana commission, which in fact had stayed its proceeding to await the outcome of the proceeding before FERC.

The ground of Midwestern's suit was that the Natural Gas Act preempts the state regulatory law on which SIGECO has based its action before the Indiana commission. The district court dismissed the suit, ruling that the Younger doctrine (on which *see, e.g., Younger v. Harris*, 401 U.S. 37, 43-53, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364-70, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 557-60 (7th Cir. 1986)) required Midwestern, if it wanted to argue preemption, to argue it as a defense in the proceeding before the state commission.

Younger holds that federal courts are not to use their equity powers to enjoin proceedings in state courts or (*see Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626-27, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986)) administrative agencies merely because the person seeking the injunction has a federal defense to the state proceeding. States oughtn't to be impeded in their efforts to enforce their own laws in their own courts and administrative agencies by injunctions issued at the behest of defendants in state proceedings who, seeking to delay and if possible derail those proceedings in mid-course, run to a federal court for an injunction against the continuation of the proceeding. *Hoover v. Wagner*, 47 F.3d 845, 848 (7th Cir. 1995); *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 957 (3d Cir. 1993); *Champion International Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir. 1984). The policy has no application to a case such as this, in which, because of dual federal-state jurisdiction over an activity, here the sale and distribution of natural gas, a federal proceeding (here before the Federal Energy Regulatory Commission) overlapping the state proceeding reaches completion while the state proceeding is still pending at an early stage. There is no affront to the state's prerogative of enforcing its own laws when valid federal law has created a federal forum for the determination of issues that the state proceeding would be able to consider and the proceeding in the federal forum determines those issues before the counterpart state forum is ready to do so. "Principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 264 n. 8, 51 L. Ed. 2d 313, 97 S. Ct. 1047 (1977); *see also Montclair*

Parkowners Ass'n v. City of Montclair, 264 F.3d 829, 830-31 (9th Cir. 2001); *Polykoff v. Collins*, 816 F.2d 1326, 1332-33 (9th Cir. 1987); *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 542-43 (9th Cir. 1985).

The Natural Gas Act grants the Federal Energy Regulatory Commission jurisdiction to regulate the interstate transportation of natural gas, 15 U.S.C. §717(b), and the Supreme Court has held that the Commission's jurisdiction is exclusive; state regulation is preempted. *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, 489 U.S. 493, 506-07, 103 L. Ed. 2d 509, 109 S. Ct. 1262 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01, 99 L. Ed. 2d 316, 108 S. Ct. 1145 (1988); *see also Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1421 (10th Cir. 1992). It seems to us, as it has seemed to the other courts to have addressed the issue, *see id.* at 1418-19; *Public Utilities Comm'n v. FERC*, 283 U.S. App. D.C. 285, 900 F.2d 269, 276-77 (D.C. Cir. 1990); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295,1300 (6th Cir. 1989), that the transportation of natural gas bought and produced out of state to Indiana residents via Midwestern's pipeline is interstate transportation rather than being intrastate transportation from, as it were, the purchasers to themselves. It is via the pipeline that gas is brought from out-of-state producers to Indiana residents. Midwestern was therefore required to obtain, and so sought and did obtain, FERC's authorization to build the lines necessary to connect its pipeline to the premises of the buyers. *See* 15 U.S.C. § 717f(c); 18 C.F.R. §157; *Northwest Central Pipeline Corp. v. State Corporation Comm'n, supra*, 489 U.S. at 520.

SIGECO, which would like to be the supplier of these buyers, was entitled to participate as a party in the FERC proceeding. 15 U.S.C. §717f(c)(1)(B); 18 C.F.R. §157.10; *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 538, 61 L. Ed. 2d 54, 99 S. Ct. 2461 (1979). As a party, litigating under a broad public convenience and necessity standard, it could make a wide range of arguments against the grant of permission to Midwestern to build the spur to the users--such arguments as that a pipeline with which SIGECO has a contract is nearer to the buyers (five thousand feet versus three miles) and that therefore less construction of new distribution lines, with possible adverse environmental consequences, would be necessary. *Midcoast Interstate Transmission, Inc. v. FERC*, 339 U.S. App. D.C. 213, 198 F.3d 960, 967-68 (D.C. Cir. 2000). SIGECO made a number of such arguments, which were rejected, setting the stage for a collateral estoppel argument by Midwestern that we'll not have to consider. SIGECO could have made every one of the arguments that it seeks to make (and that Midwestern seeks to enjoin it from making) in the proceeding before the Indiana commission, which SIGECO contends has the authority, by virtue of the two provisions of the Indiana Code that we cited earlier, which indeed require IURC's permission to hook up a pipeline within the state to a purchaser within the state, to forbid Midwestern to connect to the two users even though FERC has authorized it to do so.

Whether or not a state has some residual authority to block a connection authorized by FERC (dual federal-state authority to deny needed permits is of course common), we cannot see how the Younger doctrine is impaired by forcing a disputant to make his arguments in the first authorized forum to become seised of his dispute, just because that forum

may be federal and a state proceeding may be stacked, as it were, behind it. Indeed, there is a peculiar perversity in SIGECO's invocation of the *Younger* doctrine. It is a doctrine that channels all proceedings into a single forum, the state court or agency, *see Hickey v. Duffy*, 827 F.2d 234, 239 (7th Cir. 1987); *Waldron v. McAtee*, 723 F.2d 1348, 1357 (7th Cir. 1983); *Ballard v. Wilson*, 856 F.2d 1568, 1570 (5th Cir. 1988), whereas SIGECO is arguing for using the doctrine to split the proceedings between federal and state agencies. The injunction sought by Midwestern merely seeks to prevent vexatious litigation by a disappointed party, namely SIGECO, in the federal regulatory proceeding.

There is more that is wrong with invocation of the *Younger* doctrine in this case. The doctrine presupposes that the state has a valid interest that it is seeking to enforce, even if there may be objections based on federal law to a particular enforcement proceeding. For example, no one doubts that a state has a valid interest in enforcing the ethical rules governing the behavior of lawyers in the state's courts, though in a particular case there might be a valid federal defense--the proceeding might violate due process or some other federal right. If the state does not have such an interest, if for example it is seeking to regulate activities that clearly are under exclusive federal control, then there is no basis for invoking *Younger*. *See Chaulk Services, Inc. v. Massachusetts Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995), and cases cited there; *Norfolk & Western Ry. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991). This is not to say that a defense of federal preemption automatically defeats *Younger*, the position rejected in *New Orleans Public Service, Inc. v. Council of City of New Orleans, supra*, 491 U.S. at 364-67. That would be question-

begging. The state court has the same right and power to decide a defense of preemption as it does to decide any other federal defense. But the state here is not asserting a state interest; it is trying to take control of the interstate market in natural gas. There just is no way in which forcing Midwestern to obtain IURC's permission to deliver gas to these Indiana purchasers from out of state can be thought to advance a legitimate state interest. Mere defiance of clear federal law removing an area from potential state regulation is not such an interest.

We can see this more clearly by asking just what SIGECO's "interest" in the case is--why it wants to block Midwestern from delivering gas to these Indiana establishments. SIGECO is a local gas distribution company that has contracts with several pipelines, not including Midwestern. The pipelines do not sell gas themselves, they merely transport it, but they have affiliates that sell the gas they transport. The affiliates of the pipelines that supply SIGECO are in competition with the gas companies that sold the gas to the two Indiana purchasers who want Midwestern to deliver it to them. If SIGECO can persuade the Indiana commission to forbid Midwestern to deliver the gas, these purchasers will have to rescind their purchases and instead buy from an affiliate of one of the pipelines with which SIGECO has a contract; in that event SIGECO will make the connection between the pipeline and the customer's premises and obtain a fee for doing so. In other words, SIGECO is seeking to enlist the State of Indiana in an effort to limit interstate competition in the sale of natural gas, specifically an effort to compel users of gas in SIGECO's market area to buy from a supplier contractually linked to SIGECO. SIGECO wants to charge a toll to anyone who sells gas in its service

area.

But Congress and FERC have ordained, the former in deregulatory amendments to the Natural Gas Act and the latter in a host of implementing regulations, that there shall be a nationwide competitive market in the sale of natural gas. *See* Natural Gas Policy Act of 1978, Pub. L. No. 95-621; Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, both codified at 15 U.S.C. §3301 et seq.; Department of Energy, Federal Energy Regulatory Commission, Order No. 636, 57 Fed. Reg. 13267, 13268-69 (1992); Department of Energy, Federal Energy Regulatory Commission, Order No. 436, 50 Fed. Reg. 42408, 42411 (1985); *General Motors Corp. v. Tracy*, 519 U.S. 278, 283-84 (1997); Richard J. Pierce, Jr., "The Evolution of Natural Gas Regulatory Policy," 10 Natural Resources & Environment 53, 54-55 (Summer 1995); Michael J. Doane & Daniel F. Spulber, "Open Access and the Evolution of the U.S. Spot Market for Natural Gas," 37 J. Law & Econ. 477 (1994). It was pursuant to this federal policy that Midwestern was authorized by FERC to deliver the gas ordered from out of state by Indiana purchasers. SIGECO must be enjoined from harassing the purchasers and Midwestern by pursuing a state regulatory proceeding aimed at undoing the results of a federal regulatory proceeding.

The judgment denying the relief sought by Midwestern is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

Reversed and Remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

CAUSE NO. IP 00-592-C H/G

[Filed, November 13, 2000]

MIDWESTERN GAS TRANSMISSION COMPANY, a Delaware corporation, *Plaintiff*,	)
v.	)
WILLIAM D. MCCARTY, in his capacity as Commissioner of the Indiana Utility Regulatory Commission; DAVID A. HADLEY, in his capacity as Commissioner of the Indiana Utility Regulatory Commission; JUDITH G. RIPLEY, in her capacity as Commissioner of the Indiana Utility Regulatory Commission; CAMIE J. SWANSON-HULL, in her capacity as Commissioner of the Indiana Utility Regulatory Commission; DAVID E. ZIEGNER, in his capacity as Commissioner of the Indiana Utility Regulatory Commission; and SOUTHERN INDIANA GAS AND ELECTRIC, COMPANY, an Indiana corporation, *Defendants*.	)

JUDGES:
DAVID F. HAMILTON, JUDGE, United States District Court, Southern District of Indiana.

OPINION

ENTRY ON ALL PENDING MOTIONS

Introduction

The Federal Natural Gas Act authorizes the Federal Energy Regulatory Commission (FERC) to exercise jurisdiction, in relevant part, over "the transportation of natural gas in interstate commerce," but not over "any other transportation . . . of natural gas or . . . the local distribution of natural gas . . . ." 15 U.S.C. §717(b). Local distribution of natural gas is left to state regulation. Companies engaged in the interstate gas business have long sought to avoid state regulation of so-called "bypass" arrangements in which the interstate business bypasses a local gas distribution company and supplies gas directly to large industrial customers. Compare, *e.g., Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 333, 95 L. Ed. 993, 71 S. Ct. 777 (1951) (holding that state could exercise jurisdiction over such bypass arrangements, at least where same entity both sold and transported gas to end user), with *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 632, 638, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972) (holding that federal commission had power to issue curtailment regulation that would affect pipeline owner's direct sales contracts with industrial customers based on interstate "transportation" jurisdiction, especially to protect interests of ultimate consumers). As a general rule, local gas

distribution companies oppose such bypass arrangements, which take away big customers and substantial revenues and rate base from those companies, which are required to serve all customers in a given area.

The parties to this action disagree as to whether the Natural Gas Act applies to bar state regulation of bypass arrangements where the operator of an interstate natural gas pipeline delivers gas directly to the customer but does not also sell the gas to the customer. FERC, which is not a party to this case, and plaintiff Midwestern Gas Transmission Company (Midwestern) both say the federal law bars state regulation of such arrangements. Defendant Southern Indiana Gas and Electric Company (SIGECO) says it does not. The defendant Commissioners of the Indiana Utility Regulatory Commission have indicated they agree with SIGECO, although their principal point is that they are entitled to decide the issue themselves and to have their decision reviewed through normal processes of judicial review. The line between federal and state regulatory jurisdiction over such bypass arrangements has considerable importance in the natural gas industry and to consumers, both large and small, of natural gas. As shown below, there is ample ground for reasonable disagreement on that issue.

The central issue in this case, however, is much narrower. Plaintiff Midwestern seeks an injunction to stop three administrative proceedings now pending before the Indiana Utility Regulatory Commission. The issue here is only whether federal law somehow bars the Indiana Commission from even considering the issue of its jurisdiction and from having its decisions subjected to ordinary judicial review through the Indiana courts and ultimately to the

Supreme Court of the United States. As explained below, the answer is no. Abstention under *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), applies here, so that an injunction to stop the ongoing state proceedings is not warranted. The jurisdictional contest over natural gas bypass arrangements may go forward in the state proceedings and through the ordinary channels of judicial review. The court therefore denies plaintiff's request for injunctive relief and grants defendants' motions to dismiss this action.

The Facts

Plaintiff Midwestern is a "natural-gas company" under the Natural Gas Act, 15 U.S.C. §717a. The defendants are the SIGECO and the named Commissioners of the Indiana Utility Regulatory Commission (the "Indiana Commission"). Midwestern has contracted to transport natural gas directly to two large industrial users who buy the gas outside the state of Indiana. Those two industrial users, Grain Processing Corporation (GPC) and Scepter, Inc., are the ultimate consumers of the gas thus transported. GPC and Scepter do not purchase gas from Midwestern itself, however. The facilities of both GPC and Scepter lie within the geographic area that the Indiana Commission has allotted to SIGECO for local distribution of natural gas.

I. *The Indiana Statutes*

Section 87 of the Indiana Public Service Commission Act of 1913, as amended, requires a certificate of necessity from the Indiana Commission before a "gas utility" may render "gas distribution service" in any rural area in the state of Indiana. Ind. Code §8-1-2-87(c). A "gas utility" is defined

as "any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the state of Indiana for his, its or their domestic, commercial, or industrial use." Ind. Code §8-1-2-87(a)(4). The term "gas distribution service" is defined in Section 87 to mean "the furnishing or sale of gas directly to any consumer within the state of Indiana for his or its domestic, commercial, or industrial use." Ind. Code §8-1-2-87(a)(5). A gas utility seeking to provide such service must file an application with the Commission. The applicant has the burden of proving at a hearing that it has lawful power and authority to obtain the certificate, that it has the financial ability to provide the gas distribution service, that public "conveyance [sic] and necessity" require the rendering of the proposed service, and that the public interest will be served by issuing the certificate. Ind. Code §8-1-2-87(d).

Indiana law also imposes more specific requirements that apply to so-called "bypass" arrangements like those at issue in this case. Specifically, Ind. Code §8-1-2-87.5 ("Section 87.5") was enacted in 1985 and provides in part:

> (b) Any person, corporation, or other entity that:
>
> (1) is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state;
>
> (2) is engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers; or

> (3) is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed;
>
> is a public utility as defined in [Ind. Code §8-1-2-1] and must obtain a necessity certificate from the commission before it may engage in any activities described in this subsection. This subsection does not apply to a gas utility operating pursuant to an indeterminate permit or necessity certificate issued under [Ind. Code §8-1-2-87], nor to the production, sale, and gathering of natural gas produced in Indiana.

In addition, Ind. Code §8-1-2-87.6 governs the production, sale, gathering, and transportation of natural gas produced in Indiana. (The full text is set forth below in footnote 11 where the court addresses the dormant Commerce Clause issues raised with respect to Section 87.6.)

Midwestern owns and operates an interstate gas pipeline that operates in four states, including Indiana. Midwestern and SIGECO agree that Sections 87 and 87.5 by their terms apply to Midwestern's bypass arrangements with GPC and Scepter. Midwestern's pipeline is also connected to the SIGECO distribution system. SIGECO receives gas transported by Midwestern and then distributes that gas to SIGECO's customers, including residential, commercial, and industrial users.

II. *Midwestern's Bypass Arrangements with GPC and Scepter*

GPC operates a facility for processing corn in a rural area of Daviess County, Indiana, which is in SIGECO's service area as designated by the Indiana Commission. Midwestern contracted with GPC to construct and operate a new pipeline 2.8 miles long that connects the GPC facility to Midwestern's interstate pipeline. Midwestern also agreed to transport through these pipelines to GPC natural gas that GPC purchases from out-of-state suppliers other than Midwestern. Midwestern does not sell natural gas to GPC. At the present time, the Midwestern connection to GPC is in operation and gas is being delivered to GPC through that connection.

Scepter, Inc. operates an industrial facility where it recycles aluminum scrap and dross in Knox County, Indiana, which is also in SIGECO's service area as designated by the Indiana Commission. Scepter built a pipeline from its facility across land owned by other persons to connect with Midwestern's interstate pipeline. See Hardy Aff., Ex. A. Midwestern contracted with Scepter to transport natural gas to Scepter that Scepter purchases from out-of-state suppliers other than Midwestern. Midwestern also does not sell natural gas to Scepter. Scepter built, owns, operates, and maintains the pipeline connecting its facility to the Midwestern interstate pipeline. See Hardy Aff. P 3; Stokdyk Aff., Ex. C at 2. Before Scepter's direct connection to Midwestern was opened, Scepter received natural gas service from SIGECO. That connection from SIGECO has been closed, but it could be re-opened easily on short notice.

Midwestern contends that its connections with GPC and Scepter are under the sole regulatory jurisdiction of FERC, and that the federal Natural Gas Act preempts Indiana's Sections 87 and 87.5 as applied to such bypass connections. SIGECO disagrees. The jurisdictional dispute has generated several federal and state administrative proceedings.

III. *Proceedings on the GPC Connection*

On May 12, 1998, Midwestern filed a request with FERC pursuant to the Natural Gas Act seeking authorization to provide gas transportation services to GPC. SIGECO responded to public notice of the proceeding by filing a protest with FERC. SIGECO asserted that Midwestern's service to GPC would violate Sections 87 and 87.5 unless Midwestern first obtained a state necessity certificate from the Indiana Commission.

SIGECO also filed a petition directly with the Indiana Commission asking it to undertake an enforcement action under Ind. Code §8-1-2-115 and to issue a cease and desist order to Midwestern unless and until Midwestern complied with Sections 87 and 87.5. Other gas utilities -- Indiana Gas Company, NIPSCO, Citizens Gas, and Community Natural Gas -- also intervened in that proceeding, as did GPC. In the state proceeding, Midwestern filed a motion with the Indiana Commission on July 20, 1998, to dismiss the proceeding for lack of jurisdiction. Midwestern also filed an alternative petition asking the Commission to certify the issue of preemption for an interlocutory appeal to the Indiana Court of Appeals. See Ind. Code §8-1-3-10 (authorizing interlocutory appeals on questions of law certified by the Commission).

SIGECO asked FERC to defer its decision until after consideration of the issue by the Indiana Commission. FERC refused and claimed sole jurisdiction over the proposed bypass arrangement. On December 16, 1998, FERC issued authorization for Midwestern to proceed with the GPC contract. Midwestern then renewed its request for the Indiana Commission to dismiss the state proceedings. It also withdrew its petition for certification of the preemption issue to the Indiana Court of Appeals. On January 27, 1999, the Indiana Commission denied Midwestern's renewed request to dismiss the matter but stayed the proceedings to allow the preemption issue, then still before FERC on rehearing, to progress "through federal channels."[1]

On May 12, 1999, FERC denied SIGECO's request for a rehearing on the GPC matter. On August 21, 1999, FERC denied SIGECO's later request for reconsideration, as well. Under federal law, SIGECO and other parties to the FERC proceeding had the right to seek judicial review of FERC's decision in a United States Court of Appeals. *See* 15 U.S.C. §717r(b). SIGECO did not file a notice of appeal to seek such review of FERC's order on the Midwestern-GPC bypass arrangement. The time for appeal has passed and the FERC determination has accordingly become final and unappealable. The Indiana Commission was formally notified of that fact on July 18, 2000. There is no indication in this court's record that SIGECO or Midwestern has asked the

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[1] After the Indiana Commission denied Midwestern's motion to dismiss, SIGECO also filed suit in the Knox Circuit Court challenging Knox County's issuance of a permit to Midwestern to lay, maintain, and operate a pipeline within the county's right of way. That proceeding has also been stayed.

Indiana Commission to lift the stay of the state proceeding on the GPC bypass arrangement.

IV. *Proceedings on the Scepter Connection*

On October 13, 1999, Midwestern applied to FERC for authorization concerning the contract with Scepter. SIGECO declined to intervene in that proceeding in any way. The application was automatically approved by FERC 45 days after filing in accordance with the Natural Gas Act and its regulations. Thus, neither SIGECO nor the Indiana Commission participated in the FERC proceeding on the Scepter bypass arrangement.

After FERC issued its approval, SIGECO filed two petitions with the Indiana Commission, one against Midwestern and one directly against Scepter. In the Midwestern proceeding, SIGECO asked the Commission to investigate the Scepter connection and to order Midwestern to cease and desist from rendering gas distribution service in a rural area unless and until it obtained a necessity certificate from the Commission to do so. In the Scepter case, SIGECO asked the Commission to investigate the matter and to order Scepter to cease and desist from transporting gas in violation of Ind. Code §8-1-2-87.5(b)(3), which applies to a customer's transportation of gas across property other than the premises where the gas is consumed. On February 21, 2000, Midwestern filed a motion with the Indiana Commission for summary judgment in its case. Scepter did the same in its case. On April 10, 2000, Midwestern filed an initial complaint for declaratory relief and summary judgment in this court. Midwestern also sought a preliminary injunction. The

court heard argument on that motion while the parties were beginning to brief other dispositive motions. In early May, Midwestern and Scepter filed motions with the Commission to stay its proceedings pending the result from this court.

The Legal Issues

Midwestern seeks a declaration that FERC has exclusive jurisdiction over the bypass arrangements and an injunction prohibiting the Indiana Commissioners and SIGECO from taking further action regarding Midwestern, GPC, and Scepter, including the proceeding against Scepter to which Midwestern is not a party. SIGECO has moved to dismiss this action for lack of a ripe case or controversy. The Indiana Commissioners have moved to dismiss on the basis of Eleventh Amendment immunity for states and their officials acting in their official capacity. All defendants also contend that the court should abstain from issuing an injunction or deciding which agency has regulatory jurisdiction. Defendants rely primarily on the *Younger v. Harris* doctrine, which often applies when a federal court is asked to enjoin ongoing state proceedings. Finally, both sides have also filed motions for summary judgment as to whether the Indiana Commission may exercise jurisdiction over Midwestern's deliveries of gas to GPC and Scepter.

Because the ripeness issue affects subject matter jurisdiction under Article III of the Constitution, the court considers that issue first, then turns to the Eleventh Amendment defense and finally to the *Younger* abstention issue. Because the court finds that *Younger* abstention is required here, the court does not reach the parties' motions for summary judgment on the underlying jurisdictional dispute

as between FERC and the Indiana Commission.

I. *A Ripe Case or Controversy*

SIGECO contends first that the court must dismiss this action for lack of subject matter jurisdiction because there is no ripe case or controversy. SIGECO argues that the mere pendency of the proceedings before the Indiana Commission does not inflict any arguable injury on Midwestern, and that Midwestern is complaining only about possible effects that it might suffer if and when the Indiana Commission orders it to cease and desist from delivering gas to GPC and Scepter without a necessity certificate from the Commission. The court disagrees, essentially for reasons stated in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986), in which a state civil rights commission was investigating a complaint of sex discrimination by a teacher at a religious school. The school sought an injunction to stop the administrative proceeding, claiming that the proceeding itself violated the school's First Amendment rights to free exercise of religion. The Supreme Court addressed the ripeness issue in a footnote:

> We think that any ripeness challenge to appellees' complaint is foreclosed by *Steffel v. Thompson*, 415 U.S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U.S. at 458-460. If a reasonable threat of

> prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partially in appellees' favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

477 U.S. at 625-26 n.1; *see also Younger v. Harris*, 401 U.S. at 41 (indictment and pending prosecution of federal plaintiff established "an acute, live controversy with the State and its prosecutor"). The same reasoning applies here. The state proceedings are not merely threatened. They are actually pending. The issues relevant to the underlying jurisdictional dispute are fully developed. The principal dispute is over which of several available routes toward a possible final resolution of that issue in the Supreme Court of the United States should be available. That dispute is better addressed in terms of *Younger* abstention. At least for purposes of declaratory relief, the case presents a ripe controversy involving sufficiently imminent threats of future harm to Midwestern resulting from the Indiana Commission proceedings.

II. *The Eleventh Amendment*

Plaintiff Midwestern originally named as a defendant the Indiana Utility Regulatory Commission itself. In response to the Commission's motion to dismiss based on the Eleventh Amendment, Midwestern filed an amended complaint adding as defendants the five individual Commissioners in their

official capacities. The Commissioners also contend the Eleventh Amendment bars relief against them.

The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has held that the Eleventh Amendment bars not only those suits specifically covered by its wording but also suits brought against a state by the state's own citizens. The Amendment restricts a federal court from hearing damages actions against states or state officials acting in their official capacities. The Amendment also bars private individuals from bringing suit against states and state agencies in a federal court, with certain exceptions. *See generally Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-69, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) (noting that the "Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment").

No exception applies to Midwestern's suit directly against the Indiana Utility Regulatory Commission itself. The Commission is therefore entitled to dismissal on Eleventh Amendment grounds. The court has modified the caption in this action to remove the Indiana Commission as a named party.

To pursue its claim for relief, Midwestern relies primarily on the doctrine of *Ex parte Young* to obtain injunctive and declaratory relief against the five Commissioners in their official capacities. Under *Ex parte Young*, an individual state officer may be sued in his or her

official capacity to enjoin a prospective action under state law that would violate the Constitution. 209 U.S. 123, 159-160, 28 S. Ct. 441, 52 L. Ed. 714 (1908). As a matter of doctrine, *Ex parte Young* "treats state officials violating federal law 'as renegades acting ultra vires.'" *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999), quoting *David B. v. McDonald*, 156 F.3d 780, 783 (7th Cir. 1998). The doctrine is a species of legal fiction, but it is a venerable legal fiction that plays a central role in the relationship between federal law and state governments. "Where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar." *Coeur d' Alene Tribe*, 521 U.S. at 276-77 (opinion of Kennedy, J.); *accord*, *id.* at 294 (opinion of O'Connor, J.).

The Indiana Commissioners contend that *Coeur d'Alene Tribe* foreshadows the future abandonment or sharp restriction of the rule of *Ex parte Young* so as to bar the present suit. This court disagrees. Justice O'Connor's concurring opinion, joined by Justices Scalia and Thomas, provided the narrowest grounds for the Court's decision and is therefore controlling. Justice O'Connor reasoned that the doctrine of *Ex parte Young* should not be extended to the unusual case presented by the tribe's action, which sought not only title to the state's land (the bed of Lake Coeur d'Alene) but also a determination that would extinguish forever the sovereign power of the State of Idaho over that property. 521 U.S. at 289. In reaching that conclusion, however, Justice O'Connor plainly reaffirmed the vitality of *Ex parte Young* as that case has been applied for nearly a century. *See id.* at 291-96. Simply put, a suit under *Ex parte Young* is available where a plaintiff alleges an ongoing violation of federal law

and where the relief sought is prospective. *See id.* at 294 (O'Connor, J., concurring); *accord*, *Alden v. Maine*, 527 U.S. 706, 757, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) (where the relief sought is prospective and there is an ongoing violation of federal law, a suit under *Ex parte Young* is proper).

This analysis is also supported by *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000), in which the Seventh Circuit recently reaffirmed the vitality of *Ex parte Young* and rejected Eleventh Amendment arguments by state utility regulators similar to those raised here. The Seventh Circuit found that carriers' actions seeking prospective relief under federal law against state utility regulators in their official capacities presented a straightforward application of *Ex parte Young* that had not been undermined by *Coeur d'Alene Tribe*, 222 F.3d at 347-48; *see also Crenshaw v. Supreme Court of Indiana*, 170 F.3d 725, 729 (7th Cir. 1999) (Eleventh Amendment required dismissal of state court and attorney disciplinary commission as defendants in constitutional challenge to procedures, but not claims against state officials named in their official capacities).

In this case, Midwestern seeks only prospective equitable relief against the named Indiana Commissioners in their official capacities, and this suit does not fall within the narrow exception to *Ex parte Young* recognized in *Coeur d'Alene Tribe*. The Eleventh Amendment therefore does not bar the action against the Commissioners in their official capacities.

III. *Younger Abstention*

The defendant Commissioners and SIGECO contend that this court should abstain under *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), from issuing any injunction that would halt the ongoing proceedings before the Indiana Commission. As Midwestern points ou: "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976). However, the *Younger* exception is well-established and often applies when federal courts are asked to enjoin state proceedings that are judicial in nature. "When confronted with circumstances that clearly implicate *Younger* concerns, a federal court must abstain." *Crenshaw v. Supreme Court of Indiana*, 170 F.3d at 730, quoting *Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996).

In *Younger*, the Supreme Court held that a lower court had erred by enjoining a pending criminal prosecution in state court in the absence of bad faith, harassment, or other extraordinary circumstances that would make the defense in the state criminal proceeding insufficient to protect the federal plaintiff's federal rights. 401 U.S. at 46, 53. The Supreme Court has extended *Younger* to bar federal court injunctions against ongoing state administrative proceedings where those proceedings are judicial in nature, implicate important state interests, and provide an adequate opportunity to raise constitutional challenges. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, 91 L. Ed.

2d 512, 106 S. Ct. 2718 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982); *accord*, *Trust and Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994) (following *Middlesex County*).

Midwestern argues that *Younger* abstention should not apply here for several reasons. Midwestern argues first that the Indiana Commission proceedings (a) do not involve important state interests, (b) are not judicial in nature, and (c) do not provide an adequate opportunity to present Midwestern's constitutional challenges. Midwestern also argues (d) that the court should apply an exception to *Younger* abstention because the Indiana Commission proceedings are "flagrantly and patently" unconstitutional and because they are attempts to "relitigate" rights and issues already determined by FERC. The court concludes that *Younger* abstention is appropriate here.

A. *Important State Interests*

The state proceedings here plainly implicate important state interests, both generally in the regulation of natural gas and specifically in the regulation of bypass arrangements with industrial customers. *See*, *e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 304-06, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) ("This Court has also recognized the importance of avoiding any jeopardy to service of the state-regulated captive market . . . ."), citing *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951), and *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190 (1947). In both

Panhandle-Michigan and *Panhandle-Indiana*, the Court held that states could exercise regulatory authority over bypass arrangements for large industrial gas customers, at least where the same entity both sold the gas and transported it directly to the customer. In *General Motors v. Tracy*, the Court was also addressing bypass arrangements, although in the context of a state tax that applied to bypass sales but not to other retail sales.

Midwestern argues that Indiana has no legitimate interest in "regulating interstate natural gas transportation." That argument is ultimately circular because it is based on the assumption that Midwestern's preferred view on the underlying jurisdictional argument will prevail. Indiana plainly has a sufficient interest in this subject matter to support application of *Younger* abstention if the other criteria are satisfied.

B. *Proceedings Judicial in Nature*

The three proceedings before the Indiana Commission were initiated by SIGECO filing petitions asking the Commission to order Midwestern and Scepter to cease and desist from alleged violations of Indiana law. See Ind. Code §8-1-2-115 (Commission's enforcement authority). The potential results of these proceedings would include orders from the Indiana Commission that would be enforceable in the state courts. Also, violations of Indiana public utility laws can lead to civil liability and to penalties for infractions. See Ind. Code §§ 8-1-2-107 and 8-1-2-109. The Seventh Circuit has recognized that, for purposes of *Younger* abstention, administrative proceedings are "judicial in nature" when they are coercive, such as with "state enforcement proceedings,"

as distinct from remedial or legislative proceedings. *Majors v. Engelbrecht,* 149 F.3d 709, 712 (7th Cir. 1998) (state professional licensing proceeding was judicial in nature).

Midwestern argues that the Indiana Commission proceedings should be deemed legislative proceedings beyond the reach of *Younger* because they are essentially no different from proceedings on whether to issue a certificate of necessity, which would be deemed legislative in nature for purposes of state law. *See General Telephone Co. of Indiana v. Public Service Comm'n*, 238 Ind. 646, 150 N.E.2d 891, 894 (Ind. 1958) ("The allocation of a utility service area is a legislative function."). In *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989), the Supreme Court addressed what it means for an administrative proceeding to be judicial in nature for *Younger* purposes. The specific question in *New Orleans* was whether a city council's proceeding that resulted in a determination regarding a public utility's request for a rate increase should be treated as judicial in nature. The Court held that the city council proceeding was legislative in nature and that *Younger* abstention was not appropriate: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. . . . The making of a rule for the future . . . is an act legislative and not judicial in kind." *New Orleans*, 491 U.S. at 370-71, quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 53 L. Ed. 150, 29 S. Ct. 67 (1908). The Court recognized that it had long treated utility rate-making as "an essentially legislative act." 491 U.S. at 371.

Midwestern asserts that the Indiana certification process under Sections 87 and 87.5 is legislative in nature, similar to the rate-making function of the city council in *New Orleans*. However, the test in *New Orleans* looks to the outcome of the proceeding -- the result contemplated by the process defines its nature. The outcome of the process in *New Orleans* was a change in the public utility's rates. The ultimate results of the Indiana Commission proceedings here will not be a "rule for the future." The Commission has already carried out the "legislative" function of allocating a utility service area. Rather, the Commission has been asked to decide whether specific facts violate Indiana law and, if so, to decide upon appropriate penalties and enforcement mechanisms. Those circumstances distinguish this case from *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990), in which the Seventh Circuit held that a state administrative proceeding on whether to approve the sale of an insurance holding company was legislative in nature and thus could not support *Younger* abstention.[2]

The Commission will make those decisions about penalties and enforcement mechanisms through a process in which the parties charged with violating law have the rights to be heard, to present evidence, to cross-examine adverse witnesses, and so on. In Justice Holmes' words from *Prentis v. Atlantic Coast Line*, the Commission has been asked to

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[2] The Seventh Circuit's decision in *Alleghany Corp.* was ultimately vacated as moot, see *Dillon v. Alleghany Corp.*, 499 U.S. 933, 113 L. Ed. 2d 441, 111 S. Ct. 1383 (1991), but the Seventh Circuit has continued to treat the opinion as authoritative. See, *e.g.*, *Majors v. Engelbrecht*, 149 F.3d at 712; *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992).

investigate, declare, and enforce liabilities as they stand on present or past facts and under laws supposed already to exist. The Indiana Commission proceedings are judicial in nature for purposes of *Younger* abstention.

C. *Adequate Forum for Constitutional Issues*

Younger abstention in deference to ongoing state proceedings is not appropriate if the state proceedings do not provide an adequate forum for hearing the federal constitutional issues being raised in the federal lawsuit. *See Younger, 401* U.S. at 49 (state prosecution would give Harris "an opportunity to raise his constitutional claims"). As a general rule, of course, federal courts recognize that state courts are fully capable of and responsible for interpreting and following the United States Constitution. "It has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45. "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex County*, 457 U.S. at 431 (emphasis in original).

A complication here is the possibility that the Indiana Commission will conclude that it is not authorized under state law to pass on the constitutionality of state statutes. *See General Motors Corp. v. Indianapolis Power & Light Co.*, 654 N.E.2d 752, 763 n.2 (Ind. App. 1995) (Commission did not have jurisdiction to adjudicate challenge to constitutionality of statute underlying its order); *cf. Alleghany Corp. v. Haase*, 896 F.2d at 1054 (Easterbrook, J., concurring) ("No one believes these days that legislative and

executive branches of state governments may ignore the Constitution and federal law until slapped with an injunction."). Even if state law bars the Commission itself from deciding the constitutionality of a state statute, however, that would not be controlling here, as shown by the Supreme Court's decision in *Dayton Christian Schools, supra.* In that case, private schools claimed they were being subjected to state administrative proceedings in violation of their First Amendment rights. The schools argued that state law prohibited the state administrative body from considering constitutional defenses to otherwise applicable law. 477 U.S. at 629.

The Supreme Court was skeptical of the argument, noting that it "would seem an unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles." *Id.* Nevertheless, the asserted limit would not have affected the outcome of the case even it were actually in effect: "In any event, it is sufficient under *Middlesex* [*County*, 457 U.S. at 436], that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* In the *Middlesex County* case, in turn, the Court had deemed it sufficient for purposes of *Younger* abstention that constitutional challenges to state bar disciplinary matters could be presented to the state supreme court, either by interlocutory appeal or on appeal from a final decision. 457 U.S. at 436 & n.15.

Similarly here, even if the Commission were to decide it does not have the power to consider the constitutionality of applying the Indiana statutes to Midwestern and Scepter, the Commission clearly has the ability to certify such questions of

law to the Indiana Court of Appeals for decision. Ind. Code §8-1-3-10. Even if the Commission chose not to take the step, the constitutional issues Midwestern wishes to present here could be heard on judicial review of any enforcement action taken. The Indiana courts are fully capable of deciding those issues. *See, e.g., General Motors Corp. v. Indianapolis Power & Light Co.*, 654 N.E.2d at 763 (addressing Commerce Clause challenges to state statutes that Commission could not decide).

In addition, the judicial review process will provide Midwestern an opportunity for a federal forum for its constitutional claims. Like any litigant in a state court, if Midwestern is ultimately disappointed with the result in the state courts, it may file a certiorari petition with the Supreme Court of the United States. Because state enforcement proceedings are pending, however, the mere assertion of a constitutional claim simply is not sufficient to require a federal court to halt those state proceedings. *See New Orleans*, 491 U.S. at 365 ("It is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction."); *Alleghany Corp.*, 896 F.2d at 1051-53 (explaining that while administrative officials may be limited in their ability to interpret the Constitution, the defendant in an ongoing state enforcement proceeding is not at liberty to enjoin the state by turning to the federal courts on those grounds).

D. *Exceptions to Younger Abstention*

Thus, the basic elements of *Younger* abstention are present in this case: ongoing proceedings are judicial in nature, involve important state interests, and provide a

suitable forum for hearing Midwestern's federal constitutional challenges to Indiana law. However, the doctrine of abstention remains equitable in nature. *Younger* abstention may not be appropriate in certain exceptional circumstances, such as where the state proceedings are being pursued in bad faith or based on a desire to harass the opponent, or where the challenged state statute is "flagrantly and patently" unconstitutional. *See Middlesex County*, 457 U.S. at 429; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975); *Younger v. Harris*, 401 U.S. at 53-54.

Midwestern argues that SIGECO is acting in bad faith and for the purpose of harassing it. The argument is founded upon Midwestern's view of the merits and its belief that SIGECO should simply acquiesce after FERC and several federal circuits have rejected the arguments it raises.

The court finds no evidence of harassment or bad faith on the part of SIGECO, let alone the Indiana Commissioners. To contest the jurisdictional issue, SIGECO filed before the Indiana Commission and chose the forum it believes best protects its interests, just as Midwestern chose FERC as the forum that best protected its interests. If the Indiana statutes are valid, facts in this record provide ample reason to believe Midwestern and Scepter are in violation of Indiana law, to the detriment of SIGECO. SIGECO was entitled to turn to the Commission to seek enforcement of the state laws. Both SIGECO and the Commissioners are certainly aware of the debate over the scope of state and FERC jurisdiction. Neither SIGECO nor the Commissioners are required to defer to FERC proceedings and judicial review of FERC decisions as the sole procedure for resolving those issues.

Furthermore, a "plaintiff asserting bad faith prosecution as an exception to *Younger* abstention must allege specific facts to support an inference of bad faith. . . . This specific evidence must show that state prosecution was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights." *Collins v. County of Kendall, Illinois*, 807 F.2d 95, 98 (7th Cir. 1986) (internal quotation omitted).[3] No specific evidence of this nature has been presented by Midwestern. Certainly Midwestern has offered no support for its extraordinary assertion, see Hearing Tr. at 27-28, that the sole avenue open to the Indiana Commission itself to resolve these jurisdictional disputes is to intervene in FERC's own administrative proceedings and then to appeal from adverse rulings.

As to extraordinary circumstances, "whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Moore v. Sims*, 442 U.S. 415, 433, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979), quoting *Kugler v. Helfant*, 421 U.S. 117, 125, 44 L. Ed. 2d

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[3] In *Collins*, the court held that 34 state criminal prosecutions in two years did not establish bad faith where some resulted in convictions, some in acquittals, some in dismissals, and others were still pending. 807 F.2d at 98-99. Midwestern would have to produce far more than the conclusory assertion that SIGECO launched the state proceedings in bad faith. *See also Juidice v. Vail*, 430 U.S. 327, 338, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977) ("This exception may not be [used] unless it is alleged and proved that they are enforcing the . . . [state] procedures in bad faith or are motivated by a desire to harass.").

15, 95 S. Ct. 1524 (1975). Midwestern has not shown such an extraordinarily pressing need for immediate federal equitable relief.

Midwestern's principal argument against *Younger* abstention is that the Indiana statutes governing bypass arrangements are "flagrantly and patently" unconstitutional because they are preempted by the Natural Gas Act and violate the dormant Commerce Clause. The Supreme Court has repeatedly said that patent unconstitutionality is an exception for *Younger* abstention, but actual applications of the exception are few and far between. *See New Orleans Public Service*, 491 U.S. at 367 (assuming without deciding that a "facially conclusive claim" of federal preemption would render abstention inappropriate); *Younger*, 401 U.S. at 53-54 (federal plaintiff might show irreparable injury by showing that challenged statute is "flagrantly and patently violative of express constitutional prohibitions"), quoting *Watson v. Buck*, 313 U.S. 387, 402, 85 L. Ed. 1416, 61 S. Ct. 962 (1941); *Public Utilities Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 469, 87 L. Ed. 396, 63 S. Ct. 369 (1943) (before *Younger*, affirming injunction to stop state commission from attempting directly to regulate interstate gas prices). The court considers first the issue of preemption under the Natural Gas Act, then the dormant Commerce Clause issue. The court then turns to Midwestern's argument that *Younger* abstention should not apply because the Commission proceedings are an effort to "relitigate" matters that FERC has already decided.

1. *Preemption under the Natural Gas Act*

On the central jurisdictional issue, Midwestern contends its bypass arrangements with GPC and Scepter

involve only "the transportation of natural gas in interstate commerce," which is a matter for FERC under the Natural Gas Act, 15 U.S.C. §717(b). SIGECO contends that the bypass arrangements amount to "the local distribution of natural gas," the regulation of which is left to the states. *Id.*

The Supreme Court's decisions in the two *Panhandle* cases provide a good starting point for understanding the jurisdictional dispute. Both dealt with an interstate pipeline's efforts to bypass local distribution companies to serve industrial customers directly. *See Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n,* 341 U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951) ("*Panhandle-Michigan*"); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190 (1947) ("*Panhandle-Indiana*").

In *Panhandle-Indiana* the Court held without dissent that the Natural Gas Act did not bar the Indiana Commission from exercising jurisdiction over a bypass arrangement in which an interstate pipeline was selling and delivering gas directly to a large industrial customer. The Court acknowledged that the sales were "interstate transactions" that *could* be regulated by Congress. 332 U.S. at 512-13. Summarizing the history of its own Commerce Clause decisions on the gas industry, however, the Court explained that the Natural Gas Act was enacted not to exercise the full scope of the federal commerce power, but only to exercise federal jurisdiction over those aspects of the industry that the Court itself had held were not subject to state regulation. *Id.* at 514-17; see also *id.* at 519 ("Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach."). The Court

found that the Natural Gas Act drew the jurisdictional line "sharply and cleanly between sales for resale and direct sales for consumptive uses." *Id.* at 517. The Court concluded:

> It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption.

Id. at 519. The Court pointed out that the primary aims of the Natural Gas Act were to protect consumers against exploitation at the hands of natural gas companies and to establish cooperative action between federal and state agencies. "It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses." *Id.* at 521.

Four years later the Supreme Court revisited the subject of bypass arrangements in *Panhandle-Michigan*. There the Court upheld a state commission's order requiring a certificate of necessity before an interstate pipeline could sell gas directly to a large industrial customer that was already served by a local distribution company. Following *Panhandle-Indiana*, the Court held that such sales were sales in interstate commerce but were subject to state regulatory jurisdiction because Congress had not exercised the full scope of its

commerce power, but had sought to occupy only that portion of the field that the Court itself had barred states from regulating. 341 U.S. at 333-35. The Court again recognized the substantial interest that states have in such bypass arrangements:

> The facts in the instant case show that the proposed sales are primarily of local interest. They emphasize the need for local regulation and the wisdom of the principles just discussed. To accommodate its operations, appellant proposes to use the streets and alleys of Detroit and environs. A local utility already operating in the same area, Consolidated, receives its entire supply of natural gas from appellant. A substantial portion of Consolidated's revenues is derived from sales to large industrial consumers. Appellant ignored requests of Consolidated for additional gas to meet the increased wants of its industrial customers. Instead of attempting to meet increased needs through Consolidated, appellant launched a program to secure for itself large industrial accounts from customers, some of whom were already being served by Consolidated. In connection with the Ford Motor Company, it is noteworthy that the tap line by which appellant proposed to serve Ford directly would be substantially parallel to and only a short distance from the existing tap line by which Consolidated now serves Ford.
>
> Thus, not only would there be two

> utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of "essentially local" concern and of vital interest to the State of Michigan.

Id. at 333-34.

Panhandle-Indiana and *Panhandle-Michigan* both involved bypass arrangements in which the same entity both sold and transported the gas in question directly to industrial customers. In both cases the Supreme Court held that the transactions fell outside the Natural Gas Act's grant of federal jurisdiction over "the sale in interstate commerce of natural gas for resale . . . ." 15 U.S.C. §717(b). The state interests identified by the Court do not appear to depend at all, however, on whether the seller and transporter of the gas are the same entity, two related entities, or two unrelated entities.

Nevertheless, Midwestern argues, and FERC has concluded, that the holdings and reasoning of the *Panhandle* cases do not extend to an interstate pipeline's transportation of natural gas directly to an industrial customer so long as the pipeline company itself did not also sell the gas. Midwestern

and FERC contend that the pipeline company is then engaged only in the "transportation of natural gas in interstate commerce," and not the "local distribution of natural gas" for purposes of 15 U.S.C. §717(b). FERC's position is set forth in its order approving Midwestern's bypass arrangement with GPC. *In re Midwestern Gas Transmission Co.*, 85 F.E.R.C. 61,358, 1998 FERC LEXIS 2574, *12-*16 (1998) (Ex. A to amended complaint). Midwestern supports this argument primarily with the line-up of the Sixth, Tenth, and District of Columbia Circuits, which have agreed with FERC that states may not regulate bypass arrangements, at least where the customer buys the gas from some entity other than the pipeline operator. These circuits addressed bypass arrangements in circumstances that cannot be distinguished from Midwestern's arrangements with GPC and Scepter.[4]

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[4] Midwestern actually argues that five circuits agree with it, also citing decisions of the Second and Fourth Circuits. In *National Fuel Gas Supply Corp. v. Public Service Comm'n of New York*, 894 F.2d 571, 579 (2d Cir. 1990), the Second Circuit held that New York's law requiring state environmental approval for a bypass pipeline project was preempted by the federal Natural Gas Act. In *Public Service Comm'n of West Virginia v. Federal Power Comm'n*, 437 F.2d 1234, 1237-38 (4th Cir. 1971), the Fourth Circuit held that a state could not exercise jurisdiction over a transaction involving the lease of a pipeline used for both interstate and intrastate activities where the lease involved only interstate rights. As compared to the opinions discussed in the text, however, these opinions did not address the arguments and authorities at the core of the dispute in this case and so provide little additional weight to Midwestern's arguments.

In *Public Utilities Comm'n of California v. FERC*, 283 U.S. App. D.C. 285, 900 F.2d 269, 273-77 (D.C. Cir. 1990), the District of Columbia Circuit rejected California's attempt to assert concurrent jurisdiction with FERC over the in-state gas taps and tie-in facilities that linked an interstate gas pipeline to an industrial end-user. *Accord*, *Public Utilities Comm'n of California v. FERC*, 330 U.S. App. D.C. 96, 143 F.3d 610, 617 (D.C. Cir. 1998) (reaffirming holding that there is no concurrent jurisdiction under Natural Gas Act); *Michigan Consolidated Gas Co. v. FERC*, 280 U.S. App. D.C. 45, 883 F.2d 117, 121-22 (D.C. Cir. 1989) (upholding FERC's exercise of jurisdiction to approve bypass arrangement despite apparent reversal of long-standing agency position on bypass issues). In *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1419-21 (10th Cir. 1992), the Tenth Circuit rejected another state's effort to assert concurrent jurisdiction over an industrial customer's construction of a tap and meter facility connecting to an interstate pipeline. In *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipeline Co.*, 887 F.2d 1295, 1298-1301 (6th Cir. 1989), the Sixth Circuit affirmed a district court injunction against the state regulatory commission's effort to assert jurisdiction over bypass arrangements.[5]

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[5] *Michigan Consolidated Gas* arose in a procedural context similar to this case -- a request to enjoin state enforcement proceedings after FERC had approved the bypass in question. (In fact, FERC's decision had been upheld by the District of Columbia Circuit in *Michigan Consolidated Gas v. FERC, supra*, 883 F.2d 117.) However, the Sixth Circuit was careful to note that no party had raised any issue of abstention, so the court did not address the issue. 887 F.2d at 1302 n.3.

These circuit court opinions have given careful and thoughtful attention, based on a long history of statutes and Supreme Court decisions, to just where the line between federal and state jurisdiction should be drawn with respect to bypass arrangements. In *Public Utilities Commission of California*, the District of Columbia Circuit relied primarily on *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 94 L. Ed. 268, 70 S. Ct. 266 (1950), to draw the line based on the size of pipes and the pressure levels in them. *See* 900 F.2d at 275-77 (FERC could exercise jurisdiction over "high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains"), quoting *East Ohio Gas,* 338 U.S. at 470. The District of Columbia Circuit acknowledged that the *Panhandle* cases authorized state jurisdiction over bypass arrangements where the interstate pipeline operator was itself the seller of gas, but the court held that the industry practice of using separate companies to sell and transport the gas "removes this fulcrum for state power." 900 F.2d at 277. The court explained:

> We do not believe that this industry transition calls for a modification of *East Ohio*, or for finding it, *despite the Court's language*, limited to high pressure transmission *without delivery to an end user*. Despite the transition, the state of California has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user. It may well also have authority at the moment of delivery to low-pressure facilities for transmission to end users, a point not before us but seemingly implied by *East Ohio*.

Id. (emphasis added). Thus, the District of Columbia Circuit extended *East Ohio Gas* beyond its language to hold, in essence, that as long as the gas is delivered to the industrial end-user in a large, high-pressure pipeline, FERC has jurisdiction and the state does not. But *see Panhandle-Indiana,* 332 U.S. at 513 ("Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressure are not the criterion of the states' regulatory powers under the commerce clause.").

The Tenth Circuit reached the same result in *Cascade Natural Gas*, but by different reasoning. The Tenth Circuit chose not to follow the District of Columbia Circuit's reliance on the mechanical, pressure-based test of *East Ohio. See* 955 F.2d at 1420-21 & n.9. The Tenth Circuit instead applied a distinction between wholesale and retail sales, doing so in a way that limited state jurisdiction to local retail sales, excluding delivery to industrial customers where the customers have purchased gas in other states from entities other than the pipeline operator. *Id.* at 1421 ("While delivery by Northwest and delivery by Cascade are similar in that both result in the final local delivery for consumptive use, a local retail sale is conspicuously missing."). The Tenth Circuit focused on the Natural Gas Act's grant of jurisdiction to FERC over "the transportation of natural gas in interstate commerce," and relied on the Supreme Court's statement: "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Id.* at 1417, quoting *Maryland v. Louisiana*, 451

U.S. 725, 755, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981). The Tenth Circuit also suggested that if the change in industry practices had undermined the assumptions on which the Natural Gas Act had been based, it was up to Congress to reign in FERC's jurisdiction. 955 F.2d at 1421.

In *Michigan Consolidated Gas*, the Sixth Circuit relied primarily on the quoted language from *Maryland v. Louisiana* and held that a bypass arrangement involving a seller distinct from the pipeline operator involved "interstate transportation" within the meaning of the Natural Gas Act, 15 U.S.C. §717(b). *See* 887 F.2d at 1299-1300. The court went on to conclude that, because FERC had jurisdiction over the arrangement, the state could not exercise jurisdiction over it.[6]

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[6] Midwestern Gas also suggests that the Seventh Circuit adopted similar reasoning with respect to electricity in *Wisconsin-Michigan Power Co. v. Federal Power Comm'n*, 197 F.2d 472 (7th Cir. 1952). The Seventh Circuit held in that case that transfers of electricity across state lines between a power company's generators, for purposes of sales to local utilities that would in turn resell the power to the public, were transfers in interstate commerce subject to federal regulation. The court's opinion offers some limited support for both sides in this case, but it does not address the issue of bypass arrangements with respect to gas or electricity. The Seventh Circuit followed the obvious and strong parallels between the federal *Natural Gas Act and the Federal Power Act*, 197 F.2d at 476, and it recognized that the federal legislation was intended "to place in the Federal Commission jurisdiction which never belonged to the states, that is, sales from interstate commerce to wholesalers for resale." *Id.* at 477. The court never had occasion to address whether the federal government or state government would have jurisdiction over arrangements through which an end-user purchased electricity (or gas) in another state and made

This line-up of federal circuit courts and the federal regulatory body deserves respect and careful consideration. The Seventh Circuit has often said that district courts in this circuit should "give most respectful consideration to the decisions of the other courts of appeals and follow them whenever [they] can." *E.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Similarly, a federal agency's interpretation of an ambiguous statute it is charged with enforcing generally deserves considerable deference from the courts. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

There are limits to such deference, however. District courts should not follow other circuits uncritically, as the Seventh Circuit recently instructed in *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 926-27, 2000 WL 1528956, *3 (7th Cir. Oct. 17, 2000). There the appellate court disagreed with a district court that had relied on decisions of other circuits that did not explain persuasively their conclusions on the key issue. The parties before each federal court are entitled to that court's best judgment about a contested issue of law. *See Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 443 (7th Cir. 1994) (*en banc*) ("Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits."), *aff'd sub nom. Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152, 133 L. Ed. 2d 535, 116 S. Ct. 595 (1996). Although that

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arrangements with an entity other than the seller to deliver the electricity (or gas).

judgment should be informed by decisions from other courts that do not directly control the court making the decision, a court cannot avoid responsibility for making its own decision by merely pointing out that other courts have decided the issue in a certain way.

Similarly, the Seventh Circuit has written that deference to an agency under *Chevron* is not appropriate with respect to an agency's (expansive) interpretation of its own jurisdiction. *United Transportation Union-Illinois Legislative Bd. v. Surface Transportation Bd.*, 169 F.3d 474, 477 (7th Cir. 1999) (dicta); *Midland Coal Co. v. Director, Office of Workers' Comp. Programs*, 149 F.3d 558, 561 (7th Cir. 1998) (*Chevron* deference "does not extend" to questions of an agency's jurisdiction).[7]

Even more to the point, the principle of deference under *Chevron* is, at bottom, a rule of statutory construction. *See Chevron,* 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). With respect to the federal Natural Gas Act, the Supreme Court has repeatedly traced and followed the congressional indications that the act was not intended to exercise the full scope of federal power over interstate commerce. It was intended

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[7] Compare *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354, 380-81, 101 L. Ed. 2d 322, 108 S. Ct. 2428 (1988) (Scalia, J., concurring in the judgment) (*Chevron* deference applies to an agency interpretation of limits on its statutory jurisdiction), with *id.* at 386-87 (Brennan, J., dissenting) (*Chevron* deference does not apply to agency's jurisdictional determinations).

instead only to fill the regulatory gap left by the Supreme Court's own decisions barring states from regulating in certain situations involving interstate commerce. *See, e.g., Panhandle-Indiana*, 332 U.S. at 514-17. Under the Supreme Court's reading of the Natural Gas Act's jurisdictional grant in 15 U.S.C. §717(b), one could reasonably argue that the *Chevron* principle of deference does not even come into play, and that FERC's expansive view of its own jurisdiction over bypass arrangements is simply wrong. There is considerable support for that argument, as defendants have explained in their briefs.

The defendants build their arguments primarily on the Supreme Court's *Panhandle-Michigan* and *Panhandle-Indiana* decisions holding that states could exercise jurisdiction over bypass arrangements, at least so long as the same entity both sold the gas and transported it to the industrial end user. The defendants contend there is no persuasive reason to treat such bypass arrangements any differently based solely on the fact that the seller and the transporter of the gas are two distinct legal entities.

Under Midwestern's and FERC's analysis of this issue, federal jurisdiction would be exclusive even if the seller and transporter were two wholly-owned subsidiaries of the same parent company. Certainly the states' interests in regulating bypass arrangements, as set forth in the *Panhandle* decisions, are not affected at all by a legal separation between the seller and the transporter.

The defendants therefore contend that the appropriate line for state regulation is to permit state regulation of delivery (as well as sale) to any end-user, such as GPC and

Scepter in this case, as well as over in-state facilities linking the interstate pipeline to the end-user. Defendants contend these activities are "the local distribution of natural gas" under 15 U.S.C. §717(b). In addition, following the analysis in *Panhandle-Indiana* and *Panhandle-Michigan*, where the question under 15 U.S.C. §717(b) is whether a state could regulate the particular matter in question even if FERC did not exist, there is surely no doubt that a state could exercise legal and regulatory authority over the in-state facilities that link the end-user to the larger interstate pipeline. The state would certainly have substantial interests with respect to safety, for example, and the prospect of companies building and maintaining parallel, competing gas pipelines raises a number of local concerns of the sort that led to consolidation and regulation of local distribution monopolies a century or so ago. See generally *General Motors Corp. v. Tracy*, 519 U.S. 278, 288-90, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) (summarizing history of gas and electric competition and eventual regulation).[8]

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[8] The *Tracy* Court noted, for example, that where municipalities allowed multiple gas franchisees to serve the same areas, the "predictable and disastrous" results were wasteful as competitors built parallel delivery systems and continually tore up streets to do so. 519 U.S. at 289-90 & n.5. In this case, the Scepter pipeline across another person's property to connect with the Midwestern pipeline reflects a first step in that direction, since Scepter was already connected to SIGECO's distribution system.

The fact that the Scepter pipeline crosses another person's property also raises the prospect of a related constitutional issue, which is whether property for such bypass pipelines could be taken by the power of eminent domain as a taking for a "public use." The

Supreme Court has repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), quoting *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80, 81 L. Ed. 510, 57 S. Ct. 364 (1937) (state's order requiring gas well owners with pipeline connections to purchase gas from other well owners without pipeline connections amounted to unconstitutional taking for private purpose); *accord, e.g., Cincinnati v. Vester*, 281 U.S. 439, 447, 74 L. Ed. 950, 50 S. Ct. 360 (1930) (city could not condemn private property without basis for finding the taking would serve public purpose; city's possible future sale of such property to others could not justify taking); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-63, 41 L. Ed. 369, 17 S. Ct. 56 (1896) (taking of land and formation of water districts for purposes of irrigation project were for public purpose where all persons similarly situated had right to use the water); *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403, 416-17, 41 L. Ed. 489, 17 S. Ct. 130 (1896) (taking of railroad's land for operation of private grain elevator was unconstitutional taking of private property for private purpose where elevator was not available for use by public).

The power of a public utility to take private property has always been founded on the premise that the taking is reasonably necessary to provide a service to the general public. That premise requires that the facilities be available to all similarly situated members of the public. *See, e.g., Gradison v. Ohio Oil Co.*, 239 Ind. 218, 156 N.E.2d 80, 85-86 (Ind. 1959) (oil pipeline could exercise power of eminent domain because it is "compelled to and does accept oil from any shippers"); *Department of Treasury v. City of Linton*, 223 Ind. 363, 60 N.E.2d 948, 951 (Ind. 1945) (privately owned utilities may exercise power of eminent domain "because the use they will make of the property is a public use"); *Westport Stone*

Defendants' position also finds significant support in the Supreme Court's 1997 opinion in *General Motors Corp. v. Tracy*. The specific issue before the Court was whether Ohio had violated the dormant Commerce Clause by imposing different taxes on purchases of gas from local distribution companies and purchases from any other seller, such as producers and independent marketers who tended to be

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Co. v. Thomas, 175 Ind. 319, 94 N.E. 406, 408 (Ind. 1911) (upholding right to condemn property to build branch rail line where public would have legal right to use it without discrimination); *see also Wisconsin Central Ltd. v. Public Service Comm'n*, 95 F.3d 1359, 1367-68 (7th Cir. 1996) (regarding public utilities' powers to take property rights from railroads); *Great Northern Ry. Co. v. Chicago, St. P., M. & O. Ry. Co.*, 78 S.D. 168, 99 N.W.2d 439, 443 (S.D. 1959) (one railroad could use eminent domain to cross another railroad's property to construct spur line because the spur line was "denied to no industry which it is reasonably feasible for the spur to serve"). If a railroad, road, or pipeline is built for purely private use and is not generally available to the public, any taking necessary to complete the project would not be a taking for a "public use." *See, e.g., Continental Enterprises, Inc. v. Cain*, 180 Ind. App. 106, 387 N.E.2d 86, 90-91 (Ind. App. 1979).

There is no indication here that eminent domain (or the prospect of its use) was used to obtain the right to build the pipeline across the neighboring property. However, it is difficult to see how property could be taken by eminent domain to construct a pipeline like Scepter's connection to Midwestern if only Scepter may use it. If, on the other hand, the pipeline were available for others to use, it is difficult to see how Midwestern would not then be engaged in the "local distribution" of gas under *any* definition of the term.

located in other states. The effect of the challenged tax was to tax bypass sales to large industrial customers, such as General Motors. The Supreme Court upheld Ohio's tax in an opinion that reviewed the evolution of natural gas markets and regulatory efforts. The Court wrote:

> Half a century ago we concluded that the NGA altogether exempts state regulation of retail sales of natural gas (including in-state sales to large industrial customers) from the strictures of the dormant Commerce Clause, *see Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190 (1947), and to this day, notwithstanding the national regulatory revolution, Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved the local monopolies. *The clear implication is that Congress finds the benefits of the bundled product for captive local buyers well within the realm of what the States may reasonably promote and preserve.*

519 U.S. at 304-05 (footnote omitted; emphasis added). The Court further explained:

> This Court has also recognized the importance of avoiding any jeopardy to service of the state-regulated captive market, and in circumstances remarkably similar to those of the present case. In *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341

U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951), Ford Motor Company had entered a contract with an interstate pipeline for supply of gas at Ford's plant in Dearborn, Michigan, thus bypassing the local distribution company [LDC]. The Michigan Public Service Commission ordered the pipeline to cease and desist from making direct sales of natural gas to the State's industrial customers without a certificate of public convenience and necessity, and the pipeline brought a Commerce Clause challenge to the commission's action. The Court observed that

> "[a]ppellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in [the LDC's] over-all costs of service and its rates to customers whose only source of supply is [the LDC]. This clearly presents a situation of . . . vital interest to the State of Michigan." *Id.*, at 334.

In view of the economic threat that competition for large industrial consumers posed to gas service to small captive users, the Court again reaffirmed its longstanding doctrine upholding the States' power to regulate all direct in-state sales to consumers,

> even if such regulation resulted in an outright prohibition of competition for even the largest end users. *Id.*, at 336-337; see also *Panhandle-Indiana, supra* (upholding state regulation of direct sales to large industrial users as not pre-empted by the NGA or precluded by the dormant Commerce Clause).

519 U.S. at 305-06.

From the end of this quoted passage hangs footnote 14 of the Court's opinion, which has considerable significance for defendants because it addresses the principal circuit court cases relied upon by Midwestern and FERC on the issue of jurisdiction over bypass arrangements. The Supreme Court wrote:

> Under today's altered market structure, *see supra*, at 283-85, several Courts of Appeals have held that the NGA confers jurisdiction on FERC, rather than the States, to regulate such bypass arrangements for supplying gas to large industrial consumers when the sale of gas itself occurs outside the State and an interstate pipeline merely transports the gas to the industrial consumer for delivery in-state. *See Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1414-1422 (CA10 1992); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1299-1301 (CA6 1989), *cert. denied*, 494 U.S. 1079, 108 L. Ed. 2d 937, 110 S. Ct. 1806 (1990); *Michigan Consolidated Gas Co. v. FERC*, 280

> U.S. App. D.C. 45, 883 F.2d 117, 121-122 (CADC 1989), *cert. denied*, 494 U.S. 1079, 108 L. Ed. 2d 937, 110 S. Ct. 1807 (1990). We express no view on the correctness of these decisions.

519 U.S. at 306 n.14.

Midwestern correctly points out that the Supreme Court did not actually consider in *Tracy* the correctness of those decisions cited in footnote 14. However, for present purposes -- deciding only whether the Indiana statutes authorizing jurisdiction over bypass arrangements are "flagrantly and patently" unconstitutional -- the footnote has some significance because the Supreme Court did not observe that the cited circuit court decisions are obviously correct in their efforts to distinguish the earlier *Panhandle* decisions based on the separation of the seller and transporter. It is not unreasonable to read footnote 14 as an invitation for further consideration of the issue flagged by the Court, especially coming at the end of a discussion of the two *Panhandle* decisions and the important interests states have in regulating direct sales to large industrial customers that bypass local distribution companies, regardless of whether seller and transporter are separate entities.[9]

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[9] Defendants argue further that FERC's approach to bypass arrangements that involve separate sellers and transporters reduces to mere surplusage the specific exemption in the Natural Gas Act for "the local distribution of natural gas." 15 U.S.C. §717(b). Midwestern essentially concedes as much, but it relies on evidence that Congress in fact intended the phrase to be surplusage. *See* H.R. Rep. No. 75-709, at 3 (1st Sess. 1937) (phrase "the local

From a practical standpoint, moreover, it appears that Midwestern's and FERC's logic would extend from the situation here, in which the operator of an interstate pipeline is delivering gas directly to two large industrial customers, to similar deliveries to three, or four, or a hundred industrial customers within a state. Midwestern could be building taps and individual pipelines for all of those customers all over the state. Yet, under Midwestern's and FERC's reasoning, all that activity would not amount to "the local distribution of natural gas," at least as long as the seller and the transporter were separate corporations. As the Supreme Court observed in the midst of its discussion of the *Panhandle* cases in *Tracy*, however, "notwithstanding the national regulatory revolution, Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created *and preserved* the local monopolies." 519 U.S. at 304-05 (emphasis added).

Midwestern's and FERC's reasoning opens a potentially huge breach in those state-regulated local

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distribution of natural gas" was "not actually necessary," but because similar language had been included in previous bills, it was left in the act to avoid "the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act"), quoted with approval in *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 637 n.14, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972). SIGECO points out that the House Report simply assumed that all distribution would be associated with a sale, so that it offers little guidance as to how the act should be applied when sale and distribution are separated, as they sometimes have been in recent years.

monopolies, and it allows the interstate pipeline companies to skim what the Supreme Court called the "cream" of the business. *Panhandle-Indiana,* 332 U.S. at 521. Basing such a dramatic change in the regulatory jurisdiction over bypass arrangements on the difference between having one corporation handle both the sale and the delivery (which indisputably gives a state jurisdiction) and dividing the sale and delivery transactions between two separate corporations (which could even be two wholly-owned subsidiaries of the same parent corporation) does not appear to be the only reasonable reading of the Natural Gas Act. After all, the Act was intended only to fill a regulatory gap, not to replace existing state regulatory jurisdiction with federal power.

The Supreme Court's understanding of the Natural Gas Act as a measure to fill a regulatory gap rather than to exercise the full scope of the federal commerce power also answers Midwestern's reliance on the Supreme Court's statement in *Maryland v. Louisiana* that: "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." 451 U.S. at 755; *see also, e.g., Cascade Natural Gas,* 955 F.2d at 1417, quoting *Maryland v. Louisiana*. The Supreme Court's observation in *Maryland v. Louisiana* was part of the reasoning supporting its conclusion that Louisiana's "First-Use Tax" on natural gas discriminated against interstate commerce. The Court was not addressing in that case the Natural Gas Act's boundary between federal and state jurisdiction. If Congress chose to exercise the full scope of its Commerce Clause power, there is little doubt that Congress could choose to regulate gas sales and transportation from origin to the ultimate consumer. That is evident from the fact that, both prior to and under the Natural Gas Act, the Court

has allowed states to regulate some matters that the Court specifically identified as involving interstate commerce in natural gas. *See, e.g., Panhandle-Michigan*, 341 U.S. at 333-35; *Panhandle-Indiana,* 332 U.S. at 512, 514-16; *Pennsylvania Gas Co. v. Public Service Comm'n,* 252 U.S. 23, 31, 64 L. Ed. 434, 40 S. Ct. 279 (1920).

The central point, however, is that Congress did not choose to exercise its full Commerce Clause power when it enacted the Natural Gas Act. It chose instead to exercise its power only where the Supreme Court had held that states could not act. Thus, one might decide a jurisdictional question under the act by asking whether, if FERC did not exist at all, a state government could regulate the transaction or equipment in question. If the answer is yes, then federal authority is not needed. If the answer is no, then the federal agency would have jurisdiction.

Under this approach, there is little doubt that a state would have the authority to regulate the delivery of gas to an end-user in that state, regardless of where the gas was purchased. The Supreme Court said as much in a case decided before the Natural Gas Act, *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 68 L. Ed. 1027, 44 S. Ct. 544 (1924), where the Court distinguished between distribution of gas for resale, which was held beyond the reach of state regulation, and distribution of gas to end-users:

> The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; *and this is so whether the local distribution be*

> *made by the transporting company or by independent distributing companies*. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.

265 U.S. at 309 (emphasis added). The emphasized language, which was available to Congress when it enacted the Natural Gas Act, indicates that distribution directly to an end-user is "local distribution" that the end-user's state may regulate, even if the transaction originated in interstate commerce.[10]

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[10] A state's power to apply non-discriminatory laws to a local delivery of a product purchased in another state is by now well-established in Commerce Clause jurisprudence generally, although it was the subject of controversy in the 19th century, often debated then in terms of the "original package" doctrine. Under the original package doctrine, a state that outlawed the manufacture and sale of alcoholic beverages, for example, was barred by the Commerce Clause from regulating, prohibiting, or taxing local sales of alcoholic beverages brought from other states, so long as the beverages remained sealed in their "original packages." *See Leisy v. Hardin*, 135 U.S. 100, 34 L. Ed. 128, 10 S. Ct. 681 (1890) (applying original package doctrine to bar enforcement of state law barring sale of alcoholic beverages); *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 441-42, 6 L. Ed. 678 (1827) (striking down state tax on importers of all kinds of goods and providing source of "original package" doctrine); *see generally Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000) (reviewing history of "jettisoned" original package doctrine for purposes of interpreting Twenty-first Amendment). The original package doctrine was dead long before it was formally overruled in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976). It is clear that a state may apply non-discriminatory

Ultimately, however, in deciding whether *Younger* abstention is appropriate in this case, this court should not decide which side should prevail in the underlying debate over regulatory jurisdiction. The issue presented by Midwestern's argument is only whether the result of that debate is so clear that any effort by the Indiana Commission to exercise jurisdiction over Midwestern's bypass arrangements with GPC and Scepter would be "flagrantly and patently" unconstitutional. As the foregoing discussion should indicate, that question is easy to answer, and the answer is no.

Jurisdictional debates over gas regulation under the Commerce Clause and the Natural Gas Act have a long and complex history. The circuit courts cited by Midwestern have acknowledged the difficulty of the question and have recognized that their decisions were necessarily in tension with at least some Supreme Court opinions, just as the opposite result would produce similar tension with other Supreme Court opinions.

In this court's view, the Indiana Commission and Indiana courts are free to evaluate the authorities and the arguments and to make their own decision about whether Indiana may exercise jurisdiction over these bypass arrangements. Any party disappointed with the state's resolution of any issue of federal law is free to seek review

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laws to tax, regulate, or prohibit transactions or activities within its borders even if they originate in interstate commerce. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 84 L. Ed. 565, 60 S. Ct. 388 (1940) (upholding tax on sale of coal shipped into taxing state by seller).

from the Supreme Court of the United States.

2. *Dormant Commerce Clause*

Midwestern also argues that the Indiana statutes regulating bypass arrangements "flagrantly and patently" violate the dormant Commerce Clause because they discriminate against interstate commerce. The standard for the unconstitutionality of a state statute to invoke this exception to *Younger* is high. The challenged statute must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-54, quoting *Watson v. Buck*, 313 U.S. 387, 402, 85 L. Ed. 1416, 61 S. Ct. 962 (1941); *accord*, *Moore*, 442 U.S. at 424; *Juidice*, 430 U.S. at 338.

Midwestern bases its dormant Commerce Clause argument on Ind. Code §8-1-2-87.6.[11] Section 87.6(a)

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[11] Section 87.6 provides in full:

(a) Except as provided in this section, the production, gathering, sale, or transportation of Indiana produced natural gas is exempt from this chapter.

(b) Any person, corporation, or other entity engaged in the production, gathering, sale, or transportation of natural gas produced in Indiana may petition the commission to:

(1) require a gas utility certified under section 86 or 87 of this chapter to purchase or transport Indiana produced natural gas owned by the petitioning entity; and

(2) set the rates for the purchase or transportation of that gas.

(c) Upon receiving a petition under subsection (b), the commission

effectively excludes "Indiana produced natural gas" from the terms of Sections 87 and 87.5. Midwestern contends this exclusion shows that Sections 87 and 87.5 embody "flagrantly and patently" unconstitutional discrimination against interstate commerce, which should justify in turn an exception to *Younger* abstention. The court disagrees.

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may order the gas utility to transport or purchase the gas, and shall conduct a public hearing to set the purchase or transportation rates. The commission may only require the purchase or transportation of Indiana produced natural gas that:

(1) is of pipeline quality and reliability; and

(2) is to be delivered to a facility of the transporting or purchasing local distribution company that has adequate capacity to accept and transport the volume of gas involved.

The commission shall provide notice of the hearing in accordance with IC 8-1-1-8. The commission shall prescribe the form of the petition, the procedures for the hearing, and the parties to whom notice is to be sent.

(d) If the sale of Indiana produced natural gas to an end use consumer for consumption in the franchise territory of a gas utility with less than five thousand (5,000) customers detrimentally affects the other end use consumers in the utility's franchise territory, the utility may petition the commission to require the seller to instead sell the gas to that utility at a rate and under terms and conditions set by the commission.

(e) Any interested party may appear at a hearing conducted under subsections (c) and (d) either in person or by attorney and offer evidence in support of or in opposition to the petition. The commission may conduct an investigation and introduce any evidence obtained as a result of the investigation at the hearing.

(f) The commission may adopt rules under IC 4-22-2 to implement this section.

Read as a whole, Section 87.6 authorizes the Indiana Commission to impose extensive regulatory controls over "Indiana produced natural gas" and those who produce, gather, sell, or transport it. The statute authorizes the Commission to require public utilities in Indiana to buy Indiana-produced gas if certain conditions are met. Any such order that barred a utility from buying out-of-state gas would raise questions under the dormant Commerce Clause, of course, at least if a producer or seller of out-of-state gas raised the question. However, there is no evidence that the Commission has issued any such order. In addition, the defendants contend that Section 87.6 is essentially an exercise of jurisdiction over Indiana-produced gas that complements federal regulation over interstate aspects of the gas business. That argument is not frivolous. This court cannot decide on the sparse record in this case that Section 87.6 has had any effects at all, let alone that it violates the Constitution so "flagrantly and patently" that *Younger* abstention would not be appropriate here.

Defendants also argue that, if Section 87.6 presents any Commerce Clause problem at all, it is because it favors producers of Indiana gas over producers of gas elsewhere. Midwestern is not a producer or seller of gas. It merely transports gas, and it has not shown how Section 87.6 places it at any disadvantage.

Finally, all Indiana statutes are subject to a severability clause. See Ind. Code §1-1-1-8; *Alliance for Clean Coal v. Bayh*, 888 F. Supp. 924, 937 (S.D. Ind. 1995), *aff'd*, 72 F.3d 556 (7th Cir. 1995). Even if Section 87.6 were deemed unconstitutional or were deemed to render Sections 87 and/or 87.5 unconstitutional (which are questions this court need not

decide for purposes of deciding whether *Younger* abstention is appropriate), the Indiana courts could easily cure the problem by severing the offending provision and applying Sections 87 and 87.5 regardless of the source of the gas in question. That possibility weighs heavily in favor of *Younger* abstention so that the Indiana courts may address that issue of state law. The mere existence of Section 87.6 in the Indiana Code does not mean that Sections 87 and 87.5 "flagrantly and patently" violate the dormant Commerce Clause.

3. *The Proposed "Relitigation" Exception to Younger Abstention*

In an argument related to its assertion that the Indiana laws are "flagrantly and patently" unconstitutional, Midwestern argues that the court should recognize an exception to *Younger* abstention where the state proceedings in question amount to an effort to relitigate rights already decided through federal channels. Midwestern relies on FERC's explicit approval of the bypass arrangements with both GPC and Scepter.

The short answer to this argument is that the Indiana Commission was not a party to the FERC proceeding. It is not bound by any conclusions FERC reached about the boundary between FERC's and the Indiana Commission's jurisdictions. The Indiana Commission has the authority to pursue enforcement proceedings on its own initiative. See Ind. Code §§8-1-2-58 to -60 & -115. Thus, even if Midwestern were correct in saying that SIGECO should not be allowed to bring a collateral challenge to FERC's ruling, the Indiana Commission would be entitled to pursue the enforcement actions pending before it. *See* generally *Kerr-McGee*

Chemical Corp. v. Hartigan, 816 F.2d 1177, 1180 (7th Cir. 1987) (affirming denial of injunction to bar state court action brought by state; prior federal court decision had no preclusive effect where state had participated in case only as an amicus curiae but was not a party).[12]

Midwestern also relies heavily on *Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 255 (10th Cir. 1989), to avoid *Younger* abstention. In *Williams Natural Gas*, an interstate pipeline company had sought FERC approval for a bypass arrangement with a large industrial customer. The local distribution company had objected before FERC, arguing that FERC lacked jurisdiction and that state approval was required. FERC disagreed and issued a certificate under federal law authorizing the construction of a 12-mile pipeline extension to provide the bypass service. In the meantime, the local distribution company pursued an action in state court that resulted in an injunction against Williams Natural Gas prohibiting construction of the pipeline extension. Williams Natural Gas then sought a federal injunction against the state court action and injunction. The federal district court denied the injunction and held that it lacked jurisdiction to review the state court's decision because of the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413,

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[12] The court expresses no view on whether certification proceedings before FERC are legislative in nature (like Indiana proceedings on necessity certificates), so that issue preclusion would not be applicable even to parties. *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 16 L. Ed. 2d 642, 86 S. Ct. 1545 (1966); *Meyer v. Rigdon*, 36 F.3d 1375, 1379-80 (7th Cir. 1994) (administrative decisions will be given issue-preclusive effect only if the agency acted in a judicial capacity).

415-16, 68 L. Ed. 362, 44 S. Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983).

The Tenth Circuit reversed and directed the district court to enjoin enforcement of the state court injunction. 890 F.2d at 264. The Tenth Circuit concluded that the local distribution company's exclusive avenue for challenging FERC's issuance of a certificate was the judicial review provision of the Natural Gas Act itself, in 15 U.S.C. §717r. The state court action was therefore an improper collateral attack on the FERC certificate.

Williams Natural Gas is different from this case in one important respect. In *Williams Natural Gas*, the state regulatory body was not a party to the FERC proceedings, nor was it a party to the state or federal court litigation that ultimately resulted in an injunction against further litigation. In this case, of course, the Indiana Commission was not a party to the FERC proceedings, and the Indiana Commission itself is the governmental body pursuing the issue of enforcing Indiana law as it applies to Midwestern and its bypass customers. In *Williams Natural Gas*, therefore, the Tenth Circuit was directing entry of an injunction against collateral litigation by a party who had appeared before FERC and had lost. The court had no occasion to address in that case whether state utility regulators could be barred from pursuing their own investigation and enforcement proceeding because of the result of a FERC proceeding in which the state regulators played no part. In this case, the Indiana Commission is authorized by law to investigate and pursue on its own initiative possible violations of Indiana law relating to public utilities. This court sees no support for Midwestern's

bold assertion that, in the dual federal-state system of regulating the natural gas business, state regulators must either intervene before FERC or passively and quietly accept FERC's decisions.[13]

Conclusion

Accordingly, pursuant to the principles of comity and federalism embodied in *Younger v. Harris*, the court grants defendants' motions to dismiss. The court does not reach the other abstention doctrines argued by the Commissioners. All other pending motions are denied as moot. Final judgment shall be entered.

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[13] Midwestern has also framed essentially the same argument in terms of issue preclusion, arguing that SIGECO should be bound by the doctrine of issue preclusion because it raised the same arguments on the merits before FERC, lost in that forum, and chose not to appeal to a federal court of appeals. This court has not tried to reach any conclusions on the question of issue preclusion as applied to SIGECO because, in any event, there would be no basis for applying issue preclusion to the Indiana Commission. The Commission was not a party to the FERC proceeding. Midwestern has not offered any basis for concluding that a state commission may be barred by the doctrine of issue preclusion from making its own decision on a matter that FERC has decided in a proceeding to which the state commission was not a party.

In addition, even SIGECO did not participate in the FERC proceedings concerning Midwestern's bypass arrangements with Scepter. There appears to be no basis for barring the Indiana Commission from pursuing the two docketed matters relating to the Scepter arrangement.

So ordered.

Date: November 13, 2000

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

(2)

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-1134

In the

Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as COMMISSIONERS OF THE INDIANA UTILITY REGULATORY COMMISSION,
Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT SOUTHERN INDIANA GAS AND ELECTRIC COMPANY'S BRIEF IN SUPPORT OF PETITION

Ronald E. Christian
Robert E. Heidorn
Vectren Corporation
Hulman Building
20 NW Fourth Street
Evansville, Indiana 47708
(812) 491-4202

Wayne C. Turner
Counsel of Record
Anne L. Cowgur
McTurnan & Turner
2400 Market Tower
10 West Market Street
Indianapolis, Indiana 46204
(317) 464-8181

Attorneys for Southern Indiana Gas and Electric Company

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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CORPORATE DISCLOSURE STATEMENT

Southern Indiana Gas and Electric Company ("SIGECO") is a wholly-owned subsidiary of Vectren Utility Holdings, Inc., which is a wholly-owned subsidiary of Vectren Corporation (NYSE: "VVC"). SIGECO has no subsidiaries.

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Respondent Southern Indiana Gas and Electric Company ("SIGECO") respectfully requests that this Court grant the petition for writ of certiorari and review the Seventh Circuit's opinion in this case. Because SIGECO supports the position of petitioners, the Commissioners of the Indiana Utility Regulatory Commission ("IURC"), this brief in support is being filed in accordance with Sup. Ct. R. 12.6 (1999).

STATEMENT

SIGECO supplements petitioners' Statement to clarify SIGECO's role in the dispute between Midwestern Gas Transmission Company ("Midwestern") and the Commissioners, and to highlight certain undisputed facts that conflict with what the Seventh Circuit erroneously *assumed* about the industry and the parties before it.

SIGECO is a natural gas local distribution company ("LDC") regulated by the IURC. The IURC has granted SIGECO a necessity certificate to distribute natural gas to end-use consumers within a southwestern Indiana territory. Several interstate pipelines, *including Midwestern*, deliver natural gas to SIGECO, and SIGECO then provides retail distribution of that gas to end-use consumers within its territory. Grain Processing Corporation ("GPC") and Scepter, Inc. ("Scepter") are located within SIGECO's territory.

With rare exceptions, SIGECO does *not* sell gas to large industrial end-use consumers. Instead, as a state-regulated LDC, SIGECO must provide unbundled local distribution (delivery) service to any large customer within its assigned territory that requests and qualifies for such service. Before Scepter contracted to build and operate its own pipeline to receive local distribution service from Midwestern, SIGECO provided that local delivery service to Scepter. SIGECO was not selling gas to Scepter. Nonetheless, SIGECO had constructed and operated facilities to provide Scepter's local distribution service – facilities

which now lay idle and impose "stranded costs" on SIGECO ratepayers. Before GPC opened its Indiana facility, Midwestern contracted to build facilities for, and to provide GPC with, local distribution of natural gas purchased from out-of-state third parties. Thus, GPC has not to date invoked SIGECO's obligation to provide local delivery service to GPC.

SIGECO brought Midwestern's violations of Indiana law to the IURC's attention in petitions that requested the IURC to undertake enforcement actions, pursuant to Ind. Code § 8-1-2-115, and issue orders to Midwestern to cease and desist direct delivery of natural gas to GPC and Scepter unless and until Midwestern complied with Ind. Code §§ 8-1-2-87 and 87.5 by seeking a certificate of necessity from the IURC. SIGECO also petitioned the IURC to enforce Ind. Code § 8-1-2-87.5(b)(3) by ordering Scepter to cease and desist from transporting gas across property other than its own without a certificate of necessity from the IURC. Other IURC-regulated utilities intervened to be heard in the enforcement proceeding concerning Midwestern's service to GPC. SIGECO did not seek any individualized relief. Its petitions invoked the investigatory and prosecutorial power of the IURC. *See* Ind. Code § 8-1-2-54.

Midwestern named SIGECO as a defendant in its complaint to the district court. SIGECO supported the Commissioners' request for abstention pursuant to *Younger v. Harris* in the district court and on appeal.

REASONS FOR GRANTING THE WRIT

Like the petitioners, SIGECO urges this Court to review the opinion of the Seventh Circuit and correct that circuit's direct conflict with this Court's precedents in *Younger v. Harris*, 401 U.S. 37 (1971) and *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*").

A federal district court faced with a request to enjoin an ongoing state enforcement proceeding involving an important state interest must abstain absent "extraordinary circumstances." *Younger*, 401 U.S. at 45, 53. Although this Court has left open the possibility that a state's attempt to enforce "flagrantly and patently" unconstitutional law *might* justify entry of an injunction despite *Younger*, *NOPSI*, 491 U.S. at 366-67, this possible exception requires a claim of unconstitutionality beyond dispute, "such that no reasonable judge could disagree." Pet. 15. This certainly is not such a case, given the Natural Gas Act's ("NGA's"), 15 U.S.C. § 717 *et seq.*, express reservation of states' authority over all aspects of "local distribution" of gas and all "facilities" used for such local distribution, and given the unbroken eighty-year line of Supreme Court precedent recognizing the states' vital interests in this area. Pet. 17-19. Disregarding the NGA's reservation of state power and the important state interests in the regulation of utility service to in-state consumers, and overriding principles of federalism and comity protected by this Court, the Seventh Circuit reversed the district court's decision to abstain based upon a finding that the Indiana law governing local gas delivery by pipeline companies "seems" to be preempted. *Id.* at 12-13.

As the district court recognized, "[t]he line between federal and state regulatory jurisdiction over such bypass arrangements has considerable importance in the natural gas industry and to consumers, both large and small." App. A 11a. The Seventh Circuit, in its hasty rejection of state regulatory interests, failed even to address the key statutory reservation of state power and, as the petition shows, created

standards that conflict directly with this Court's decisions in *Younger* and *NOPSI*. As shown below, the Seventh Circuit's opinion was also based on fundamental misconceptions of the natural gas industry and its regulation. For these reasons as well, the court's opinion demonstrates the "danger of allowing a court faced with a *Younger* abstention question to resolve the merits of preemption on a 'quick look' before deciding whether to abstain." Pet. 11.

I. The Seventh Circuit's Preoccupation With The National Market For The *Sale* Of Gas Is Both Misplaced And Wrong.

In today's natural gas market, suppliers around the country compete to sell gas directly to end-use consumers. Gas can be purchased anywhere, so long as transportation can be arranged. While gas and interstate transportation can be purchased together as a "bundled" product from LDCs or from middlemen ("marketers"), large industrial customers commonly purchase gas and transportation separately, acquiring the interstate transportation services they need directly from pipeline companies. *General Motors Corp. v. Tracy*, 519 U.S. 278, 303 (1997).[1] Pipeline companies are *not* permitted to sell gas. Thus, interstate pipelines do not compete with LDCs for the sale of gas.

The Seventh Circuit's opinion sweeps away states' interests in regulating local gas *distribution* services and facilities – as well as the NGA's express reservation of this state power – based on the extraordinary and erroneous premise that states might be aiding LDCs in an effort to restrict the sources or locations from which large end-users *buy their gas*. But in light of fundamental, undisputed and correct market facts, LDCs (and the states in which the LDCs operate) *have no interest in controlling* where industrial

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[1] For further detail on the evolving natural gas market, *see generally* Order No. 637, 65 Fed. Reg. 10155, 10184 (Feb. 25, 2000) and *United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

customers shop for their gas. Moreover, as a result of its errors, the court of appeals' opinion would *restrict*, not open, the natural gas market it says it is protecting.

A. LDCs provide end-use consumers with broad access to suppliers in the competitive national market for the sale of natural gas.

When an end-use consumer shops the national gas market, it can consider buying natural gas from any source with access to a pipeline or series of pipelines that eventually connects with the LDC in the consumer's area. LDCs typically are served by *multiple* pipelines. For example, SIGECO receives gas from suppliers in various regions of the country through at least four interstate pipelines, *including Midwestern*. See Supplemental Appendix at sa1 (United States Energy Information Administration map depicting pipelines that serve Indiana) and sa2 (similar map depicting pipelines that serve the Midwest). Some of these pipelines, such as Texas Gas Pipeline Company, transport gas from producers in the Gulf of Mexico area, while others, such as Midwestern, transport gas from the Chicago "hub" and from Canadian pipelines and producers. The gas commodity is fungible, but prices often vary by region.

Contrary to the court of appeals' misconception, SIGECO reaps no economic advantage from a retail customer's selection of one pipeline over another. However the gas arrives, SIGECO makes money only on its local distribution of the gas, not on any aspect of the out-of-state purchase or on carriage of the gas by interstate pipelines.

Because LDCs are the largest customers of interstate pipelines' transportation services and are usually a necessary last step in the transport of gas from supplier to retail customer, any interstate pipeline close enough to an LDC's service territory to serve LDC customers has had a strong economic motive to connect to the LDC. Thus, subject to operational restrictions, consumers like [illegible]PC and Scepter

that are within SIGECO's delivery area can (1) purchase gas from any supplier that transports gas on Midwestern's pipeline *or* on other pipelines that connect to SIGECO, (2) purchase interstate pipeline transportation to the SIGECO local distribution system, and (3) purchase local distribution service from SIGECO.[2]

GPC and Scepter are not receiving local distribution service from the LDC, choosing instead to have gas distributed to them directly by only one pipeline, Midwestern. The result is that GPC and Scepter can purchase gas *only from those suppliers who, by virtue of geography and contract, have access to Midwestern's pipeline.* If SIGECO were providing the local distribution, GPC and Scepter could access all those suppliers *in addition to* suppliers with access to other pipelines connecting to SIGECO's distribution system.

B. State regulation does not restrict competition in the sale of gas, but the bypass does.

The Seventh Circuit erroneously assumed that allowing the IURC to regulate Midwestern's direct retail distribution to Indiana consumers would allow the state to "take control of the interstate market in natural gas," because "[i]f SIGECO can persuade the Indiana commission to forbid Midwestern to deliver the gas, these purchasers will have to rescind their purchases and instead buy from an affiliate of one of the pipelines with which SIGECO has a contract." App. A 7a. But this notion that Midwestern is not connected to SIGECO's system is nonsense. No party has disputed or could dispute the district court's finding that, in addition to

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[2] The first step, the purchase of gas, has been deregulated pursuant to the Natural Gas Policy Act of 1978 and the Natural Gas Wellhead Decontrol Act of 1989, both codified at 15 U.S.C. § 3301 *et seq.*; the second step, the transportation from wellhead to the LDC, is regulated by the Federal Energy Regulatory Commission; and the final step, local distribution by the LDC, is regulated by the individual state regulatory agencies.

other pipelines: "Midwestern's pipeline is also connected to the SIGECO distribution system. SIGECO receives gas transported by Midwestern and then distributes that gas to SIGECO's customers, including residential, commercial, and industrial users." App. B 14a.

This was not an incidental error. The Seventh Circuit's misguided concern about protecting the Congressionally-mandated interstate market in the *sale* of gas is *fundamental* to its decision. Thus, it erroneously holds that Indiana's laws regulating the bypass are "mere defiance of clear federal law." *See* App. A 7a-8a. Ironically, Midwestern's direct local distribution to GPC and Scepter through bypass *constricts* the open market the court claims to be shielding from state interference. Contrary to its stated purpose, the court of appeals endorses locking those customers into purchasing only from suppliers with access to Midwestern's pipeline.

II. The Seventh Circuit Disregards Critical State Interests In The Regulation Of Retail Gas Distribution.

As petitioners explained, this Court has unwaveringly appreciated the vital state interests in regulation of utility service to retail consumers. Pet. 17-19. Before and after enactment of the NGA, this Court has carefully divided state and federal regulation of the interstate natural gas market by recognizing the states' responsibility for regulating the "local business" and "essentially local concern" of direct local service to retail consumers. *See, e.g., Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 309 (1924); *Pennsylvania Gas Co. v. Pub. Serv. Comm'n*, 252 U.S. 23, 28 (1920); *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507, 521 (1947); *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951).

This case and other disputes over state versus federal regulatory power have arisen because pipeline companies

have *chosen to enter the business of direct, local gas delivery*. Pipeline companies have sought to contract with large industrial customers to "bypass" the LDC and deliver the gas from the source directly to the end-user – *i.e.*, to provide both interstate transportation and direct local distribution of the gas. Like the LDC, the bypassing pipeline company (or its customer) builds local distribution facilities that have no function whatever *other than* the local delivery of gas. As with the LDC, the local delivery facilities used by the pipeline company can be built only by tearing up streets and fields – often alongside preexisting LDC facilities. Although these pipeline companies have elected to perform the same function or act of local distribution as the LDCs, with the same local effects and consequences, the pipeline companies claim they are not subject to state regulation of this local aspect of their business.

Through its misguided preoccupation with the interstate market in natural gas sales – a market in no way jeopardized by state regulation of an interstate pipeline's retail distribution of gas to end-use consumers – the court of appeals disregarded this Court's precedents recognizing the importance of local interests in gas delivery. The Seventh Circuit did not address the state's right and need to deal with the unnecessary local burden of Midwestern's construction of facilities to serve Scepter that *duplicate* SIGECO's existing facilities. The court did not consider that if GPC grows unhappy with Midwestern's distribution service or wants to purchase gas from a supplier *not* able to transport on Midwestern's pipeline, it can demand that SIGECO provide this service. SIGECO, which is required by the IURC to serve all interested customers in its territory, would have to construct new, duplicative, local distribution facilities to serve GPC.

The court of appeals similarly gave no answer to the concern that Scepter is *not* a FERC-regulated utility. FERC approved only Midwestern's tap or connection to Scepter's intrastate pipe. If the Commissioners are enjoined from enforcing Ind. Code 8-1-2-87.5(b)(3), then Scepter owns and

is transporting gas over Indiana soil through pipeline facilities that are *not regulated by either federal or state government. But see* 15 U.S.C. § 717(c) (the "Hinshaw Amendment," confirming state regulatory authority over such intrastate transmission facilities).

These uniquely local concerns are at the heart of this Court's recognition of the need for state regulation of local gas distribution. The NGA expressly reserved this power for the states. It is a grossly insufficient treatment of these local concerns for the court of appeals to assert that SIGECO, a private party, should have asserted these and any other interests of Indiana citizens before federal regulators.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

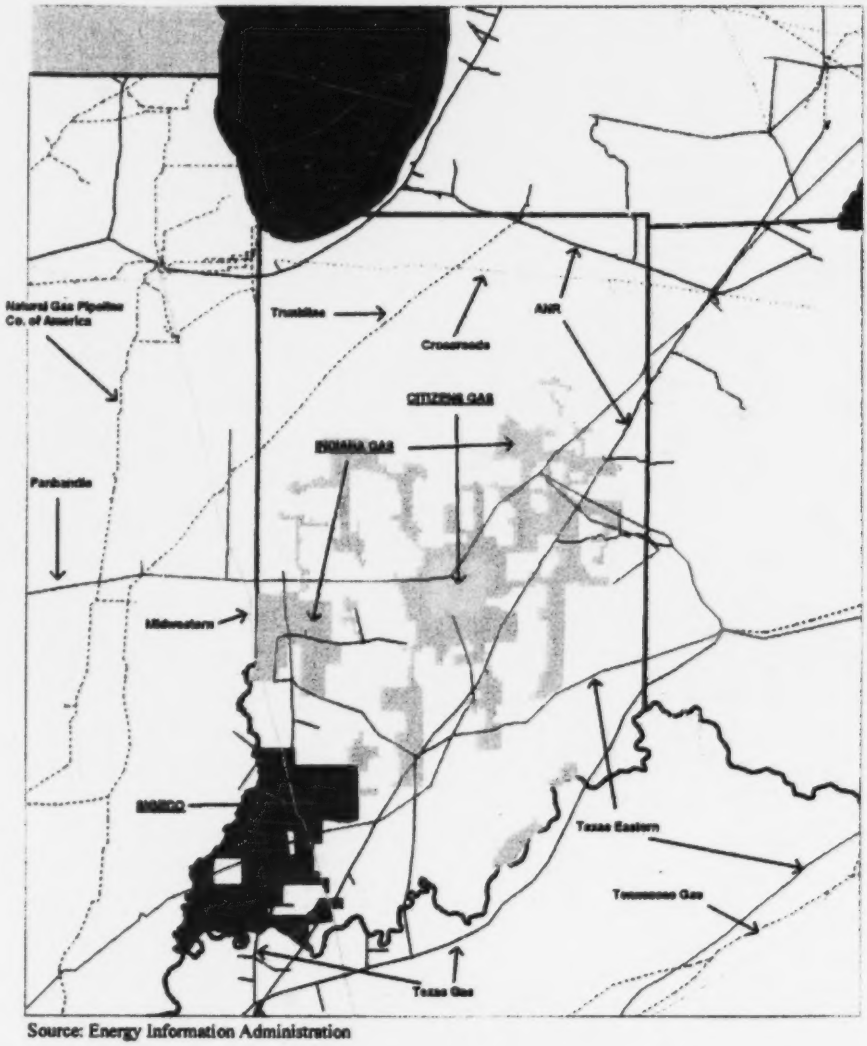
Respectfully submitted,

Ronald E. Christian
Robert E. Heidorn
Vectren Corporation
Hulman Building
20 NW Fourth Street
Evansville, Indiana 47708
(812) 491-4202

Wayne C. Turner
Counsel of Record
Anne L. Cowgur
McTurnan & Turner
2400 Market Tower
10 West Market Street
Indianapolis, Indiana 46204
(317) 464-8181

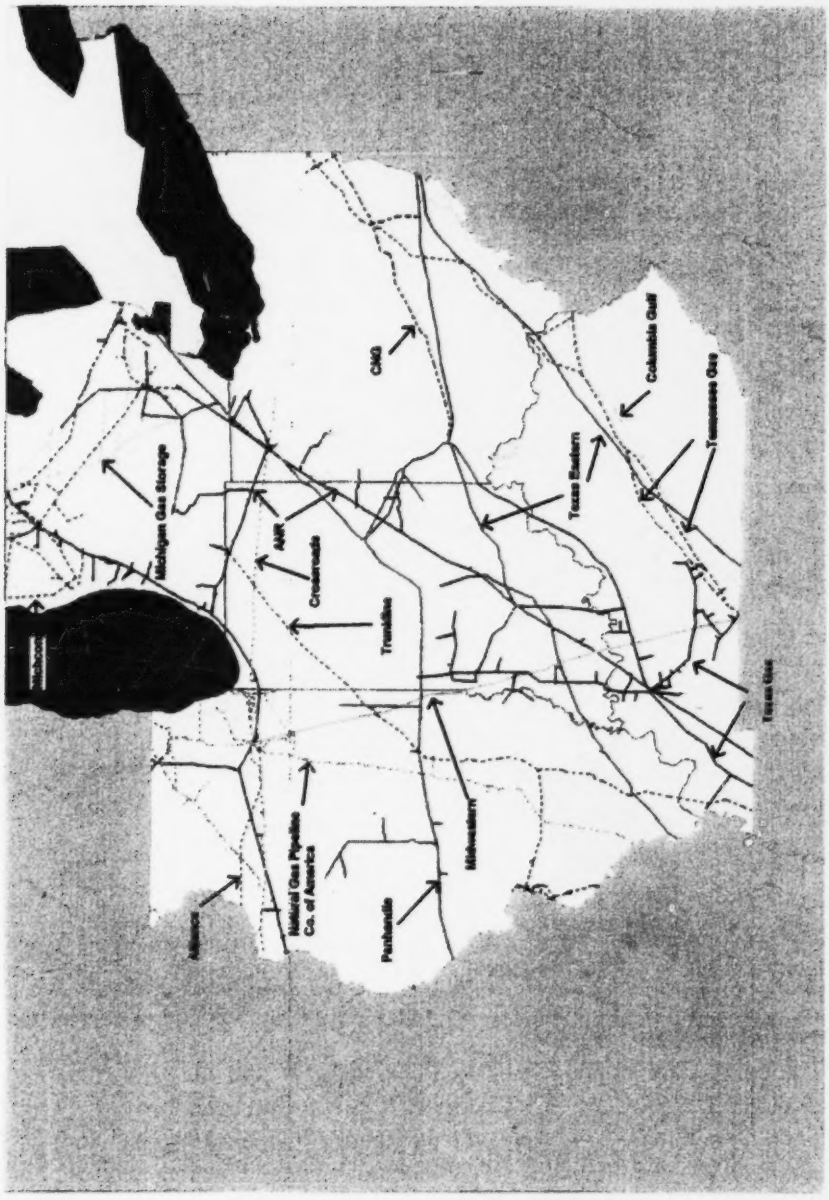
Counsel for Southern Indiana Gas and Electric Company

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In The

Supreme Court of the United States

WILLIAM D. McCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL AND DAVID W. ZIEGNER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE INDIANA UTILITY REGULATORY COMMISSION,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY AND SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICI CURIAE BRIEF OF SCEPTER, INC., AND INDIANA INDUSTRIAL ENERGY CONSUMERS, INC. IN SUPPORT OF RESPONDENT MIDWESTERN GAS TRANSMISSION COMPANY

TODD A. RICHARDSON
Counsel of Record
JOHN F. WICKES, JR.
LEWIS & KAPPES
1700 One American Square
Box 82053
Indianapolis, Indiana 46282-0003
(317) 639-1210

Counsel for Amici Curiae
Scepter, Inc., and Indiana Industrial Energy Consumers, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTEREST OF AMICI CURIAE

This amicus brief is submitted jointly on behalf of Scepter, Inc. ("Scepter") and Indiana Industrial Energy Consumers, Inc. ("INDIEC").[1]

This appeal arises from an action in which a federally regulated interstate pipeline, Midwestern Gas Transmission Company ("Midwestern"), sought declaratory and injunctive relief with respect to regulatory proceedings before a state agency challenging two arrangements that had been authorized by the Federal Energy Regulatory Commission ("FERC"). The arrangements in question involved direct connections between Midwestern's interstate pipeline facilities and two end use consumers located in southern Indiana, through which the consumers could receive natural gas purchased from suppliers outside of Indiana without going through the system of the local gas utility serving the region, Southern Indiana Gas and Electric Company ("SIGECO"). SIGECO commenced three proceedings before the Indiana Utility Regulatory Commission ("IURC") challenging the arrangements under Indiana law, two directly against Midwestern and the third naming one of the consumers

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[1] This brief is submitted pursuant to Supreme Court Rule 37.2(a) with the written consent of all parties, copies of which are attached hereto. This brief was not authored in whole or in part by counsel for Midwestern or any other party. No person or entity other than these amici curiae, their members and counsel has made any monetary contribution to the preparation or submission of this brief. Neither Scepter nor INDIEC are publicly held, neither have any parent corporations and no publicly held companies own 10% or more of either corporation's stock.

as respondent. Midwestern then commenced the underlying action to enforce the FERC authorizations and enjoin the conflicting IURC proceedings.

Scepter is one of the two consumers that implemented a direct connection to Midwestern's pipeline (the other is Grain Processing Corporation, "Grain Processing") and is the named respondent in one of the three IURC proceedings that are at issue here. Accordingly, Scepter has a direct and substantial interest in the outcome of this case. INDIEC is an organization whose members operate industrial facilities located in Indiana that consume large volumes of natural gas and electricity; neither Scepter nor Grain Processing, however, is a member of INDIEC. INDIEC represents the industrial viewpoint on legislative, regulatory and administrative issues relating to energy consumption by industrial consumers in Indiana, and has an interest in the development of responsible energy policies that will encourage economic development by promoting the availability of competitive, low-cost energy. In the proceedings below, both Scepter and INDIEC were granted leave to appear as amici curiae by the Seventh Circuit, where they filed separate amicus briefs supporting Midwestern.

II. SUMMARY OF ARGUMENT

In addition to the points presented by Midwestern, this case does not warrant discretionary review by this Court for three reasons. First, the petition and the supporting SIGECO submission fail to acknowledge the constitutional infirmity of the Indiana statute under which

the IURC seeks to proceed. That statute discriminates on its face against interstate commerce and in favor of Indiana suppliers, and hence is invalid under dormant Commerce Clause principles. At the Seventh Circuit, however, the IURC commissioners and SIGECO argued that the constitutional issue was not preserved for appeal, thereby clouding this Court's ability to decide the merits without leaving a pregnant and dispositive question unanswered.

Second, the procedural posture makes this case a poor vehicle for deciding the ultimate questions of FERC jurisdiction argued in the petition. This is not a direct appeal from a FERC order asserting jurisdiction, but rather concerns the reversal of a dismissal of a declaratory judgment action on abstention grounds. Neither the IURC commissioners nor SIGECO address the exclusivity of the federal judicial review procedure by which the FERC authorizations at issue could have been challenged. That omitted issue provides an independent basis for barring collateral challenges before state tribunals.

Third, this Court's recent decision affirming FERC Order No. 888 militates against granting the petition here. That decision comprehensively addressed the interaction between FERC and state jurisdiction in the context of FERC's initiatives to facilitate competition in the energy industry, the same general subject the IURC commissioners and SIGECO seek to revisit in this case. The Seventh Circuit's decision here is entirely consistent with that ruling, which confirmed FERC's jurisdiction over the interstate transmission of electricity to end use consumers. The Seventh Circuit, moreover, reached the same conclusion regarding FERC's exclusive authority over the interstate transportation of natural gas as every other

Circuit that has addressed the issue. There is no split in the Circuits and no compelling need for another decision by this Court covering largely the same issues decided in the FERC Order No. 888 appeal.

III. ARGUMENT

A. The Indiana Statute Petitioners Seek to Enforce Is Unconstitutional on Its Face, Yet that Pivotal Issue Has Not Been Presented Here for Decision

The Indiana statute under which the IURC commissioners seek to act in the proceedings brought by SIGECO was designed to impose state regulation on arrangements involving direct connections between end use consumers and interstate pipelines. It provides, in relevant part:

> Any person, corporation or other entity that:
>
> (1) Is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state;
>
> (2) Is engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers; or
>
> (3) Is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed;

> is a public utility as defined in section 1 of this chapter and must obtain a necessity certificate from the commission before it may engage in any activities described in this subsection. This subsection does not apply to a gas utility operating pursuant to an indeterminate permit or necessity certificate issued under section 87 of this chapter, nor to the production, sale, and gathering of natural gas produced in Indiana.

Ind. Code §8-1-2-87.5(b).

The statute, in other words, prohibits the transportation of gas "from outside Indiana" to an end use consumer, either directly (subsection (b)(1)) or through an intermediary ((b)(2)-(3)), absent state commission authorization, *unless* the transportation service is provided by a state-regulated gas utility or the gas was "produced in Indiana." *See also* Ind. Code §8-1-2-87.6 (exempting "Indiana produced natural gas" from utility regulation, with limited exceptions). On its face, the statute differentiates between gas transported from outside Indiana and gas produced within the state. It subjects suppliers of interstate transportation services, as well as consumers seeking to do business with such suppliers, to regulatory barriers not faced by in-state suppliers. In obvious purpose and clear effect, it shelters state-regulated local gas utilities from competition by federally-regulated interstate pipelines.

The Commerce Clause, U.S. Const. Art. I, §8, cl. 3, prohibits state laws that discriminate against interstate commerce. *See Associated Industries of Missouri* v. *Lohman*, 511 U.S. 641, 646 (1994). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism –

that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988). Statutes that discriminate on their face are subject to a "virtually *per se* rule of invalidity." *Associated Industries*, 511 U.S. at 647; *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). Such legislation is unconstitutional unless demonstrably justified, upon the strictest scrutiny, by legitimate local purposes that cannot be adequately served by nondiscriminatory alternatives. *See Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581-82 (1997); *Healy* v. *Beer Institute*, 491 U.S. 324, 340-41 (1989). The statute here cannot survive that test.

As the Seventh Circuit noted, the State here has no valid interest other than a desire to regulate the interstate market. *See* App. at 7a. The public utility context does not, in itself, establish a valid local interest that would supersede the virtually *per se* rule of invalidity. *See Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 391 (1983) ("Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence."). *See also Wyoming* v. *Oklahoma*, 502 U.S. 437, 454-58 (1992); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 339-43 (1982); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596-97 (1923).

Still less does the State have a legitimate purpose that cannot be addressed through non-discriminatory alternatives. Asserted concerns relating to local conditions, health and safety (*see* Petition at 17-19) are not justifications for facial discrimination against interstate commerce. *See Chemical Waste Management, Inc.* v. *Hunt*, 504

U.S. 334, 344 (1992) ("The burden is on the State to show that 'the *discrimination* is demonstrably justified by a valid factor unrelated to economic protectionism' ") (emphasis in original, footnote omitted) (*quoting Wyoming*, 502 U.S. at 454). There has been no showing the asserted interests proffered here can only be protected by erecting regulatory barriers targeting interstate suppliers and their customers.

In context, then, the rhetoric presented by the IURC commissioners in terms of state sovereignty and principles of federalism (*see* Petition at 19-21) is cast in the wrong paradigm. This is a situation in which the State seeks to advance an isolationist policy by enforcing a protectionist statute that discriminates against interstate commerce. FERC, by authorizing direct connections between interstate pipelines and end use consumers, has advanced a policy favoring competition and economic efficiency in the national market, to the ultimate benefit of consumers in every state. *See, e.g., Cascade Natural Gas Corp.* v. *FERC*, 955 F.2d 1412, 1422-25 (10th Cir. 1992) (describing rationale for FERC policy). Indiana wishes to frustrate that federal policy and provide shelter to in-state suppliers by imposing regulatory obstacles to interstate transactions. In purpose and effect, Indiana's strategy is unconstitutional.

Rather than confronting the constitutional defect in the statute they seek to enforce, the IURC commissioners and SIGECO have not even included the Commerce Clause challenge in the issues presented in this appeal. *Compare Arkansas Electric Cooperative*, 461 U.S. at 382 n.6 (finding preemption argument made by United States as amicus curiae to be fairly included in Commerce Clause

issue raised by appellant). At the Seventh Circuit, both appellees argued that the constitutional challenge was not properly preserved for appeal. *See* IURC Commissioners Brief of Appellees at 35-36; SIGECO Brief of Appellee at 34-35. Their position, therefore, is that this Court should decide the merits without answering a question of central importance to the very themes they advocate. The Court should not undertake to decide the proper balance between federal and state authority in this case without considering whether the state statute at issue discriminates against interstate commerce, and should not grant a petition implicating serious constitutional problems that the petitioners do not wish to address.

B. Petitioners Failed to Raise Directly through the Federal Judicial Review Process the Issues They Now Wish to Present by Collateral Challenge

The IURC commissioners and SIGECO are pursuing a collateral challenge to FERC's authorizations of the direct connections between Midwestern and the two consumers. They present that challenge in the context of a reversal of a dismissal on abstention grounds of a declaratory judgment action brought in response to state agency proceedings targeting the arrangements authorized by FERC. The convoluted procedural posture is a function of the fact that the IURC commissioners and SIGECO elected not to pursue direct judicial review of the FERC proceedings. Their failure to utilize the exclusive judicial review process provides independent grounds for concluding their collateral attack on the FERC authorizations is contrary to federal law, and the procedural complexities resulting

from that failure make this case a poor vehicle for deciding the jurisdictional questions they wish to address.

As the Seventh Circuit noted, SIGECO and the IURC commissioners had every opportunity to present their arguments within the context of the FERC proceedings. *See* App. at 5a. When FERC was entertaining the request for authorization of the Grain Processing arrangement, SIGECO actively participated in the FERC proceedings and the State intervened through the Indiana Office of Utility Consumer Counselor. *See In re Midwestern Gas Transmission Co.*, 85 FERC ¶61,358 (1998). When the request for FERC authorization of the Scepter arrangement was filed, SIGECO and the IURC received individualized notice as well as notice by publication. *See* 4/26/00 Stokdyk Aff. Ex. C, Request at 2; 64 Fed. Reg. 57,635 (1999). In both instances, FERC granted the requested authorizations, but neither SIGECO nor the IURC (nor any other party) sought judicial review of the FERC proceedings. *See* App. at 17a-18a.

Section 19 of the Natural Gas Act ("NGA"), 15 U.S.C. §717r, establishes the procedure for challenging a FERC determination, through and including review by this Court upon certiorari. *See* NGA §19(b), 15 U.S.C. §717r(b). On its face, the procedure is specifically applicable to a "State commission" and any other party aggrieved by a FERC order. *See* NGA §19(a), 15 U.S.C. §717r(a). The IURC as well as SIGECO, therefore, could have pursued judicial review of the FERC authorizations in accordance with federal law. *See National Fuel Gas Supply Corp.* v. *Public Service Commission*, 894 F.2d 571, 578-79 (2d Cir.), *cert. denied*, 497 U.S. 1004 (1990) (holding state agency

proceedings under state law preempted by FERC authorization; "The [state commission] was free to intervene and present whatever contrary data it wished. It declined to do so.").

When Congress establishes a procedure for judicial review of administrative orders, the statutory framework is the exclusive avenue of recourse and precludes *"de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (footnote omitted). *Accord Williams Natural Gas Co.* v. *City of Oklahoma City*, 890 F.2d 255, 261-63 (10th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990) (holding state court barred from revisiting issue of preemption underlying FERC assertion of jurisdiction; parties cannot "circumvent the scheme of judicial review under §19 simply by choosing not to file a petition for review with FERC or the court of appeals"). Because the judicial review procedure specified by Congress is exclusive, state tribunals lack jurisdiction to entertain collateral challenges to FERC determinations.

Notably, SIGECO vigorously argued the scope of FERC authority and applicability of Indiana law during the FERC proceedings relating to Grain Processing (*see In re Midwestern Gas Transmission Co.*, 85 FERC ¶61,358 (1998)), and thus was barred by collateral estoppel from relitigating the same issues before the IURC and in the proceedings below. *See National Association of Regulatory Utility Commissioners* v. *FERC*, 823 F.2d 1377, 1382 (10th Cir. 1987) (holding principles of collateral estoppel applied to FERC jurisdictional determination). *See also Federal Power Commission* v. *Louisiana Power & Light Co.*,

406 U.S. 621, 647 (1972) (noting FERC's predecessor had primary authority to determine its jurisdiction and such determination could be reviewed "in due course pursuant to §19(b) of the Act, 15 U.S.C. §717r(b)"). Having presented its theories to FERC unsuccessfully, SIGECO was precluded from seeking a different answer from another tribunal. Insofar as the IURC proceedings at issue were all commenced by SIGECO as petitioner (*see* App. at 16a, 18a), collateral estoppel provides another independent basis for barring the attempted relitigation before a state tribunal.

The IURC commissioners and SIGECO, however, have not presented as issues before this Court the procedural impediments troubling their collateral challenges to the FERC authorizations. They blame the Seventh Circuit for supposedly fostering a "race to the courthouse" mentality (*see* Petition at 19-21), but offer no excuse for their failure to present their arguments through the judicial review process prescribed by Congress. Instead of coming to this Court by direct appeal from the FERC proceedings pursuant to the statutory directive, SIGECO and the IURC commissioners solicit this Court's intervention in support of satellite litigation pursued in defiance of federal law. The issues on which the IURC commissioners and SIGECO wish to focus, therefore, are subject to procedural bars they are obviously reluctant to address.

C. The Seventh Circuit's Decision is in Harmony with Prevailing Law, Including a Recent Decision by This Court Covering Essentially the Same Subject Matter

Subsequent to the filing of the petition by the IURC commissioners, the Court handed down the decision in *New York* v. *FERC*, 122 S. Ct. 1012 (2002), affirming the jurisdictional determinations in FERC Order No. 888. The context and substance of that case parallel the regulatory issues raised here, and the Seventh Circuit's decision in this case is entirely consistent with the legal analysis in *New York*.

The Court in *New York* rejected arguments by the State of New York that FERC's assertion of authority over unbundled retail transmission of electricity encroached on state jurisdiction, explaining that the Federal Power Act ("FPA") granted FERC authority over *both* the sale of electricity at wholesale *and* the interstate transmission of electricity. *See* 122 S. Ct. at 1022-27. *Compare* NGA §1(b), 15 U.S.C. §717(b) (granting FERC jurisdiction over both sales of natural gas for resale and "the transportation of natural gas in interstate commerce"). "Because the FPA authorizes FERC's jurisdiction over *interstate transmissions*, without regard to whether the transmissions are sold to a reseller or *directly to a consumer*, FERC's exercise of this power is valid." *New York*, 122 S. Ct. at 1024 (emphasis added). The Seventh Circuit's conclusion here – that the interstate transportation of natural gas directly to consumers lies within FERC's jurisdiction under the NGA (*see* App. at 4a) – thus closely tracks this Court's construction of the corresponding provisions of the FPA in *New York*.

The subject area addressed in *New York*, furthermore, concerned FERC's initiatives to foster competitive conditions in the interstate energy market. This Court confirmed that FERC acted within its authority by regulating interstate transmissions reaching to end use consumers. In the pending petition, the IURC commissioners seek to revisit the same subject, challenging FERC's authority to promote competition in the interstate gas market by regulating interstate transportation to end use consumers. In terms of policy overtones as well as legal reasoning, the questions raised here have been authoritatively answered in *New York*.

As the Seventh Circuit noted (*see* App. at 4a) and the IURC commissioners acknowledge (*see* Petition at 15 n.8), moreover, the decision here reaches the same conclusion as that of every other Circuit Court that has considered the issue: FERC's jurisdiction over the transportation of gas in interstate commerce confers exclusive authority to regulate direct connections between interstate pipelines and end use consumers. *See Cascade Natural Gas*, 955 F.2d at 1416-21; *Oklahoma Natural Gas Co.* v. *FERC*, 906 F.2d 708, 710 (D.C. Cir. 1990); *Public Utilities Commission* v. *FERC*, 900 F.2d 269, 273-74 (D.C. Cir. 1990); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1299-1302 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); *Michigan Consolidated Gas Co.* v. *FERC*, 883 F.2d 117, 121-22 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990). There is no conflict among the Circuits, therefore, necessitating resolution by this Court.

Given the consistency of prevailing law, the IURC commissioners must carry a heavy burden to demonstrate "compelling reason" for granting the petition here.

See Supreme Court Rule 10. The contention that the Seventh Circuit allegedly mischaracterized an aspect of the natural gas market (*see* Petition at 10; SIGECO Brief in Support at 4-7) does not rise to that level. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The suggestion that important state interests in utility regulation are compromised by FERC's exercise of authority (*see* Petition at 17-19; SIGECO Brief in Support at 7-9) is the same proposition recently examined and rejected in *New York*. The IURC commissioners and SIGECO have not presented any compelling reason for this Court to take up another appeal covering essentially the same territory as a case decided only a few weeks ago.

IV. CONCLUSION

For the foregoing reasons, Scepter and INDIEC respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

TODD A. RICHARDSON
Counsel of Record
JOHN F. WICKES, JR.
LEWIS & KAPPES
1700 One American Square
Box 82053
Indianapolis, Indiana 46282-0003
(317) 639-1210

Counsel for Amici Curiae Scepter, Inc., and Indiana Industrial Energy Consumers, Inc.

(4)

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WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as COMMISSIONERS OF THE INDIANA UTILITY REGULATORY COMMISSION,

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v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MIDWESTERN GAS TRANSMISSION COMPANY

JANET K. PLACE
General Counsel
NORTHERN PLAINS NATURAL GAS COMPANY
1111 South 103rd Street
Omaha, Nebraska 68124-1000
(402) 398-7886

G. DANIEL KELLEY, JR.
Counsel of Record
WILLIAM P. DIENER
EDWARD P. STEEGMANN
ICE MILLER
One American Square
Box 82001
Indianapolis, Indiana 46282
(317) 236-2100

Attorneys for Respondent Midwestern Gas Transmission Company

173289

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

10998

CORPORATE DISCLOSURE STATEMENT

Midwestern Gas Transmission Company ("Midwestern") is a wholly owned subsidiary of Border Midwestern Company. Border Midwestern Company is a wholly owned subsidiary of Northern Border Intermediate Limited Partnership. Northern Border Intermediate Limited Partnership is owned by three general partners, two of which are wholly owned subsidiaries of Enron Corporation and one of which is a wholly owned subsidiary of The Williams Companies, Inc. The Williams Companies, Inc. is a publicly held company. Northern Border Intermediate Limited Partnership also has one limited partner, Northern Border Partners LP, a publicly held company.

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NO QUESTION PRESENTED — DISMISSAL REQUIRED

The "questions" asserted by Petitioners are based on misquotes and misconstructions of the Seventh Circuit's decision, and present nothing. Petitioners "questions" are far worse than being argumentative, contrary to S. Ct. Rule 14.1(a) — the Petition should be summarily dismissed.

The Seventh Circuit in regard to *Younger* abstention, adopted the unanimous view of the First, Sixth, Ninth and Eleventh Circuits, n.20, *infra*, that this Court does not require *Younger* abstention where State proceedings are "on their face plainly invalid", *Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 468-69 (1943), or "perhaps" where federal preemption is "facially conclusive", *New Orleans Public Service Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 367 (1989) (*NOPSI*). A State has no valid interest in pursuing patently or facially invalid actions or proceedings. *See infra*, pp. 15-18.

A fair reading of the Seventh Circuit's determination of facially clear preemption **is not** as concocted and misquoted by Petitioners that such was based on "its preliminary view that the State law 'seems' to be preempted . . . ". Pet. (i), or a "quick look at the merits", or "lowered the bar to 'seems' preempted," or created a "lax 'seems' preemption standard" (Pet. 11, 14, 19). To the contrary, the Seventh Circuit adopted an unbroken line of cases ("It seems to us, as it has seemed to the other courts to have addressed the issue"), including multiple cases from three circuits, n.26, *infra*, as well as an uncontested jurisdictional decision of this Court, that the unbundled transportation of user purchased gas in one State to the user's facility in another State "via Midwestern's pipeline is the transportation of natural gas in interstate commerce", for which the exclusive regulatory jurisdiction is given to FERC pursuant

to Section 1(b) of the Natural Gas Act (NGA, "§ 1(b)"), 15 U.S.C. § 717(b).[1] M.App. 4a.

That transportation of user purchased natural gas out-of-state into the user's in-state facility is within § 1(b)'s unambiguous grant of jurisdiction to FERC over "transportation of natural gas in interstate commerce", every circuit has found to be clear, beyond any doubt. Preemption could not be more facially conclusive, clear or readily apparent, as found by the Seventh circuit. *See* pp. 21-28.

These circuits' decisions were affirmed by this Court's recent decision, *New York, et al. v. FERC, et al.*, __ U.S. __, 122 S. Ct. 1012, 1022-23 (2002), under language in § 2(b)[2] of the Federal Power Act strikingly similar to § 1(b) of the NGA (where like under the NGA, FERC has jurisdiction over wholesale sales, but not retail sales, and over transmissions in

1. Section 1(b) has been limited by the Natural Gas Policy Act of 1978, Pub.L. 95-621, 15 U.S.C. § 3301 *et seq.* ("NGPA") and the Natural Gas Wellhead Decontrol Act of 1989, Pub.L.101-60, amending certain provisions of 15 U.S.C. § 3301 *et seq.* ("NGWDA") in "Subchapter VI, Coordination With Natural Gas Act" which limits § 1(b) and other provisions of the NGA from applying to "first sales". 15 U.S.C. § 3431. Section 1(b) and other relevant statutory texts are reproduced in Midwestern's Appendix hereto(M.App.) at 1a. Petitioners are "P.App."

2. Section 2(b), 16 U.S.C. § 824(b)(1) states in part:

> The provisions of this subchapter shall apply to the **transmission of electric energy** [like transportation in § 1(b)] **in interstate commerce** and to **the sale of electric energy at wholesale** [like wholesale gas § 1(b)] . . . but . . . **shall not apply** [like the NGA's proviso] to any other sale of electric energy . . . the Commission . . . **shall not have jurisdiction,** . . . over facilities used for the generation of electric energy or over facilities used in **local distribution** or only for the transmission of electric energy in intrastate commerce. . . .

(Emphasis added.)

interstate commerce, with a similar proviso regarding local distribution) that *unbundled retail transmission* is subject to FERC's jurisdiction over "transmission of electric energy in interstate commerce" which this Court found to be clear and unambiguous. Preemption as found by the Seventh Circuit could not be more facially conclusive, clear or readily apparent. *See infra*, pp. 21-28.

The Seventh Circuit did not create any exception to *Younger* based on the FERC case being first filed — Petitioners' misconstruction at the base of Question 3. To the contrary, in addition to finding *Younger* inapplicable because of the facially clear preemption, the Seventh Circuit found *Younger* inapplicable based on SIGECO's "vexatious", "harassing" litigation, "aimed at undoing the results of federal regulatory proceedings," (P.App. 8a) a proceeding where SIGECO and Indiana appeared, in which FERC decided the very issues raised by SIGECO's subsequent, but voluntarily stayed, Petition before the IURC (petitioners herein ordered a stay "deferring the federal preemption issue for resolution by federal forums"), which FERC decision neither SIGECO nor the Indiana agency appealed, and SIGECO filed several more IURC petitions and a State Court action, all "aimed at undoing" the FERC decision and certifications of the transportation for GPC and Scepter. *See infra*, pp. 21-28.

STATEMENT OF THE CASE

The unregulated third party natural gas sales out-State to the industrial users, GPC and Scepter, and the unbundled transportation by Midwestern of the user-purchased natural gas in interstate commerce into the users' in-State facilities — giving rise to SIGECO's forum shopping and vexatious litigation before FERC, the IURC and an Indiana Circuit Court — were the result of the congressional mandates from 1978 to 1989 in the NGPA and NGWDA creating a competitive integrated national natural gas market and the congressionally encouraged FERC

requirements (Orders 436 and 636[3]) for unbundled, open access interstate pipeline transportation. Federal law requires Midwestern to provide unbundled interstate transportation service to customers, like GPC and Scepter, on a non-discriminatory basis. 18 C.F.R. §§ 284.8 and 284.9.

The unambiguous language of NGA § 1(b) leaves no doubt that ever since 1938, the last foot of unbundled transportation of user-purchased out-State gas into the user's in-State facility is transportation in interstate commerce subject to FERC's exclusive jurisdiction. Further, the history of deregulation, unbundling and open access, demonstrates that such is now more than ever necessary to effectuate the Congressional mandates, *infra*, pp. 4-8. Indeed, several amendments set forth again and again that such last foot of the interstate journey into the user's facility is within FERC's exclusive jurisdiction over the transportation of natural gas in interstate commerce, *infra*, pp. 26-28. Indiana's legislative attempt to assume regulatory jurisdiction over such are patently, clearly, facially invalid as preempted, *infra*, pp. 14-18.

Deregulated National Market And Open Access Interstate Transportation. While unbundled interstate pipeline transportation of user-purchased natural gas from out-of-State to users' facilities in-State has been occurring for more than 40-50 years, historically it was uncommon and not encouraged — despite this Court's affirmance that FERC's jurisdiction over "transportation in interstate commerce" encompasses unbundled transportation of user owned gas into the user's plants "as § 7 require[s] the Commission to certificate the transportation of gas pursuant to the sale." *See FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 3 (1961) affirming FPC's denial of a Section 7 certificate (15 U.S.C. § 717f(c)) for unbundled transportation of user-owned gas based

3. Order 656, 57 FR. 13267-02 (1992), and Order No. 436, 50 FR 424085-01 (October 18, 1985) amending and adding various parts of 18 C.F.R. 284.

on non-jurisdictional considerations "including" the unpreferred use of gas to displace coal to produce electricity and the concern for the effect of unregulated prices on wholesale prices.

The 1938 NGA[4] gave FERC independent grants of jurisdiction over (i) wholesale sales of natural gas and (ii) over the transportation of natural gas in interstate commerce.[5] Under NGA's regulatory structure, the interstate pipelines purchased the gas from the producers, selling a bundled product (transportation and gas) to the local distribution companies (LDC's) throughout the country, and then LDC's distributed the gas to consumers. However, the structure had unintended consequences on the supply side. In the interstate wholesale market regulated by FERC, the prices for natural gas from producers were set at a rate below the price in the second unregulated intrastate market. This resulted in two different markets for natural gas with gas being withheld from the national market and national shortages but excess supply in certain intrastate areas.[6]

Beginning in 1978 with the NGPA and concluding in the 1989 NGWDA, Congress created an integrated, competitive

4. With respect to the history leading to the NGA, *see United Distribution Company v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996) *cert. den. sub nom American Public Gas Ass'n v. FERC*, 520 U.S. 1224 (1997).

5. States, not FERC, have jurisdiction over in-State bundled sales of natural gas to industrial users by interstate pipelines, as FERC has only wholesale sales jurisdiction. *Panhandle-Eastern Pipeline Co. v. Public Service Comm'n of Ind.*, 332 U.S. 507, 516-22 (1947) and *Panhandle-Eastern Pipeline Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951). Today, the States' jurisdiction with respect to first-sale gas is questionable. *See Transcontinental Pipeline Corporation v. State Oil & Gas Board of Mississippi*, 374 U.S. 409, 422 (1986), *infra*, p. 6.

6. *See* the history set forth in *Transcontinental Gas Pipeline Corporation v. State Oil and Gas Board of Mississippi*, 474 U.S. 409, 422 (1986).

national natural gas market by deregulating essentially "any sale" of natural gas to anyone, specifically including "***to any person for use by such person***" (*except a sale by* a pipeline or an LDC), whether for resale, consumption, interstate or intrastate, *i.e.*, the purchased gas by GPC and Scepter.[7] The deregulation of such "first sales" encompassed not only price, but market entry and exit.[8] Some States saw the deregulation as an opportunity for State regulation, but this Court quickly disagreed, holding that the answer "whether Congress in revising a comprehensive Federal regulatory scheme to give market forces a more significant role in determining the supply, demand and the price of natural gas, intended to give the States the power it had denied FERC, . . . must be in the negative." *Transcontinental Gas Pipeline Corporation v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 422 (1986).

At the outset of the deregulation effort, it became apparent that a national market could not develop in the face of interstate pipelines being able to refuse transportation services to others to protect pipeline sales to third parties. The market function was indeed subject to market power — monopoly power.[9] Open access and unbundling were required. In a series of orders, mainly Order 436 in 1985, FERC then attempted to

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7. *See* 15 U.S.C. § 3301(21), and *Public Service Commission of the State of N.Y. v. Mid- Louisiana Gas Company, et al.*, 463 U.S. 319, 324 (1983) (the definition of "first sale" meant that "there may be many first sales of a single volume of gas between the well and the pipeline's customers").

8. 15 U.S.C. § 3431(a)(1)(A), (b)(1)(A) and (C) essentially deleted a "regulatory milestone" from the NGA (*Phillips Petroleum*, *infra*) and provided that jurisdiction under § 1(b) of the NGA shall not apply to a first sale, that any amount paid for a first sale "shall be deemed just and reasonable" for purposes of §§ 4 and 5 of the NGA and that a certificate cannot be denied or conditioned under § 7 of the NGA because of a first sale price. (M.App. 4a). *See also* 50 FR 42408, 42418 (Oct. 18, 1985).

9. *United Distribution Company v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996), *cert. den. sub nom*, *American Public Gas Ass'n v. FERC*, 520 U.S. 1224 (1997).

prompt the interstate pipelines to unbundle and to give open access transportation service to industrial users, LDC's and any other first-sale buyer. Congress had specifically sought to encourage direct purchases by users, effectively authorizing the Commission to discriminate by issuing certificates of public convenience and necessity "for the transportation in interstate commerce of natural gas used [and owned] by any person for one or more high priority uses."[10]

With enactment of the 1989 NGWDA, Congress sought an unregulated, integrated national gas market in which "**[a]ll sellers must be able to reasonably reach the highest bidding buyer in an increasingly national market. All buyers must be free to reach the lowest selling producer, and obtain shipment of its gas to them on even terms with other suppliers.**"[11] The Joint Committee stressed the necessity for open transportation markets and that FERC must continue to insure "open access" by regulation of the pipelines' monopoly power. In response to these Congressional urgings, in 1992 FERC went from mere incentives under Order 436 to mandatory unbundling and open access under Order No. 636.[12]

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10. 15 U.S.C. § 717f(c)(2). (M.App. 2a-3a). Before this amendment to Section 7, FERC issued Order No. 533 permitting unbundled interstate transportation of natural gas purchased by high priority users from producers which the D.C. Circuit affirmed as "a legitimate, experimental approach for dealing with the apparently skewed nature of our half-free market". *American Gas Association v. FERC*, 587 F.2d 1089, 1097 (D.C. Cir. 1978). *See also Associated Gas Distributors v. FERC*, 824 F.2d 981, 1042 n. 41 (D.C. Cir. 1987), where the D.C. Circuit rejected an argument that this amendment to Section 7(c) of the NGA, § 717f(c)(2), creates an inference that FERC's jurisdiction over transportation of user owned gas in interstate commerce does not extend to transportation into an end-user's facility).

11. House Conference Report No. 101-100, 101-29, U.S. Code, Cong. & Admin. News (USCCAN), Vol. 2 (1989), pp. 51, 53, 56.

12. "The Commission believes that to accomplish [Congress'] objectives, **it is vital to give all gas purchasers (LDC's and end-users,**

(Cont'd)

Today, downstream marketers and market centers exist along with secondary interstate transportation markets for resold pipeline capacity.[13] The Congressional efforts at a competitive national natural gas market served through non-discriminatory open access interstate transportation allow all buyers to reach the lowest cost producers and all sellers to reach the highest bidding buyers. This has resulted in the vast majority of industrial, electric generators and commercial end users *and the LDC's bypassing* the pipelines and buying gas from parties other than pipelines[14] — in other words, reach a competitive national market for gas and purchase mandatory non-discriminatory unbundled interstate transportation (in both a primary and secondary market) back into the purchaser's facility.

FERC Proceedings. On May 12, 1998, Midwestern filed a request with the FERC seeking authorization to construct and operate facilities to be used to transport natural gas to GPC. M.App. 8a. **SIGECO and the Indiana Office of Utility Consumer Counselor, an agency of the State of Indiana, intervened.** (M.App. 11a) That the IURC did not appear makes no difference.[15] SIGECO filed a protest contending that Midwestern's interstate transportation service to GPC would violate Indiana law, Ind. Code 8-1-2-87 ("Section 87") and/or

(Cont'd)
such as industrials and gas-fired electric generators) the ability to make market driven choices about the price of gas as a commodity and about the cost of delivering the gas". [57 FR 13267, 13269, emphasis added].

13. *See* FERC Order No. 637, 65 FR. 10156 (Feb. 9, 2000); CCH Utility Law Reports, ¶ 5802.

14. *Id.*, pp. 6325-6326.

15. The Office of Consumer Counselor is an "agency" and represents "ratepayers, consumers and the public in . . . in all other proceedings including proceedings before federal agencies. . . ." Ind. Code 8-1-1.1-4.1. Public officials of a government are in privity with their government as to official acts and successive litigation. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940).

Ind. Code 8-1-2-87.5 ("Section 87.5"), M.App. 12a-13a, which purport to require a certificate for any entity that "is engaged in the transportation of gas from outside Indiana for its direct sale or delivery to any end-user consumer or consumers within this State. . . ." Section 87.5(b). M.App. 6a-7a. SIGECO also objected based on asserted stranded costs, environmental problems, that GPC had not negotiated in good faith with SIGECO and for a myriad of other reasons. M.App. B, *passim*.

FERC's Unappealed Decision. On December 16, 1998, the FERC issued its order authorizing Midwestern's construction and operation of facilities for provision of interstate transportation service to GPC. M. App. B. The FERC specifically rejected SIGECO's contentions and held based on indistinguishable decisions by three Federal Circuits that the NGA preempts § 87 and/or § 87.5, the Indiana statutes pursuant to which SIGECO claimed that the IURC had jurisdiction over the Midwestern-GPC transaction. M. App.15a-19a. Neither SIGECO, nor the State appealed under 15 U.S.C. § 717r(b), the exclusive avenue for challenging FERC's decisions.[16]

The IURC (Petitioners) Defers Preemption Issue To Federal Forums. On June 11, 1998, SIGECO filed a petition before the IURC for a cease and desist order against Midwestern providing transportation for GPC because of non-compliance with Sections 87 and 87.5. M.App. 41a *et seq.* Petitioners misstate that: "On June 11, 1998, the IURC began a proceeding targeting Midwestern's . . . ." Pet. 4. On January 27, 1999, the IURC, acknowledging "that the weight of federal decisions would suggest that the application of the Indiana statutes to the instant petition would not survive a federal challenge, **stayed SIGECO's proceeding (which stay remains to this**

16. On October 13, 1999, Midwestern filed an application with the FERC for the Scepter interstate transportation service of natural gas to be purchased by Scepter in the unregulated national market. M.App. 60a-64a. After notice (64 F.R. 57,635 (1999)), and after no protest was filed, Midwestern automatically received FERC approval. 18 C.F.R. § 157.205(i)(1).

day) "while the federal preemption question progresses through federal channels. . . . We are in effect deferring the federal preemption issue for resolution by federal forums." M.App. 57a. Petitioners misstate that the stay was only pending the FERC proceedings. Pet. 4.

SIGECO Pursues More Litigation. After the stay, on April 14, 1999 SIGECO filed an action in State court seeking to stop Midwestern's construction of the GPC lateral under a roadway, which proceeding the State court stayed (Cir.'s App. 105, 119), and filed in January 2000 two more petitions before the IURC based on Sections 87 and 87.5.

The District Court. In April, 2000, Midwestern filed this action seeking to enjoin SIGECO and Petitioners from proceeding under the Indiana statutes which purport to require certification to transport user-purchased gas out-of-State to the user's Indiana facilities as such were preempted by § 1(b) of the NGA. The District Court granted motions to dismiss, holding that it was compelled to abstain under *Younger* in deference to SIGECO's IURC proceedings.

The Seventh Circuit's Decision. The Seventh Circuit recognized that *Younger* abstention is not required if the State proceeding and statute are facially invalid:

> If the State does not have such an interest, if for example, it is seeking to regulate activities that clearly are under exclusive federal control, there is no basis for invoking *Younger*. *See Chaulk Services Inc. v. Massachusetts Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995), and cases cited there; *Norfolk & Western Ry. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991). (P.App. 6a.)

The Seventh Circuit determined that when the NGA grants FERC jurisdiction, "such is exclusive and preempts State

regulation," citing *Northwest Central Pipeline Co. v. State Corporation Comm'n*, 489 U.S. 493, 506-07 (1989) and *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). Then, in light of the three circuits which previously decided the precise issue before it, n.26, *infra*, the Court held:

> **It seems to us, as it has seemed to the other courts to have addressed the issue** [citations omitted to the Tenth, the D.C. and the Sixth Circuits] that the transportation of natural gas bought and produced out-of-State to Indiana residents via Midwestern's pipeline is interstate transportation. . . . (P.App. 4a).

Hence, the Court determined that Indiana had no valid interest in requiring IURC permission to transport gas from out-of-State to the Indiana purchasers: "Mere defiance of clear federal law removing an area from potential state regulation is not [a valid State] interest." P.App. 7a.

This was not, as petitioners misstate, that the Seventh Circuit simply held that "it 'seems' to be preempted" or that it created "a lax 'seems' preempted standard" Pet. 9, or that the Court simply said "it 'seems' to us, these circuits were correct." Pet. 14. All the matters which Petitioners castigate the Seventh Circuit for not discussing were fully discussed in the decisions of the Sixth, Tenth and District Court of Columbia Circuits adopted by the Seventh Circuit.

The Seventh Circuit did not hold that once a FERC petition is filed, subsequent State proceedings can be enjoined, as Petitioners assert in Question 3. Rather, the Seventh Circuit found *Younger* inapplicable for an additional reason — "harassing," "vexatious litigation" by SIGECO "aimed at undoing the results of [a FERC] proceeding," (P.App. 6a, 8a.) because the FERC action was first filed, first decided, and unappealed — an action in which Indiana and SIGECO appeared and decided all the issues which SIGECO later sought to present to the petitioners here. The IURC proceedings remained at an

early stage (indeed, had been stayed by the petitioners here "deferring the federal preemption issue for resolution by the federal forums"). M.App. 57a. Based on these facts, the Seventh Circuit held that the *Younger* policy "has no applicability to a case such as this, in which . . . a federal proceeding (here before the Federal Energy Regulatory Commission) . . . reaches completion while the state proceeding is still pending at an early stage. . . ."[17]

The Seventh Circuit reasoned that:

> we cannot see how the *Younger* doctrine is impaired by forcing a disputant to make his arguments in the first authorized forum to become seised of his dispute. . . . There is a peculiar perversity in SIGECO's invocation of the Younger doctrine. . . . SIGECO is arguing for using the doctrine to split the proceedings between the federal and state agencies. The injunction sought by Midwestern merely seeks to prevent **vexatious litigation** by a disappointed party, namely SIGECO, in the Federal regulatory proceedings. [P.App. 5a-6a]

The Seventh Circuit then concluded, not merely because of any first filed concept, but that:

> SIGECO **must be enjoined from harassing** the Purchasers and Midwestern by pursuing State regulatory proceedings **aimed at undoing the results** of a federal regulatory proceeding. [P.App. 8a].

Corrections Pursuant To S. Ct. Rule 15.2.[18] In addition to the corrections noted heretofore, SIGECO's Brief 2-8 contains

17. P.App. 3a, quoting *Town of Lockport v. Citizens for Community Action at Local Level Inc.*, 430 U.S. 259, 264, n.8 (1977)): "[P]rincipals of comity and federalism do not require that a federal court abandon jurisdiction that it has properly acquired simply because a similar suit is later filed in state court."

18. Sprinkled throughout the Petition and SIGECO's Brief are repeated references to "local distribution service" or "local delivery" of

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not a single reference to the Record or Appendix as to any fact, but attaches a map concerning various pipelines, makes unsupported assertions about the quantity of SIGECO's sales to large industrial users, its territory, about supposedly having to provide service at some unknown cost if GPC or Scepter should return to the fold, that SIGECO doesn't want to sell gas to industrial users, the economic motive of pipelines to connect to an LDC, whether the GPC/Scepter arrangements foster competition — who knows the truth of these untested assertions and other statements which *dehor* the record? **SIGECO's Brief should be ignored or stricken.**

The only thing which is clear is that SIGECO tried to get GPC's business by making presentations to GPC, and failed. M.App. 26a. It also failed to convince FERC that there was "anti-competitive" behavior, or that Midwestern's interstate transportation was uneconomic, or that SIGECO had stranded costs, and failed in arguing that the IURC was not preempted. M.App. 15a-23a. Put simply — SIGECO was competing and lost.

Indiana has provided the means for SIGECO to compete by having special rates and tariffs for large industrial users, as well as the authority to negotiate contracts with such industrial users. *See* the discussion by the IURC, *In re Indiana Gas Company, Inc.*, 122 PUR. 4th 365, 1991 WL 501832 (Ind. URC, 1991). SIGECO now reaps the benefits of a competitive national market and purchases all of its gas in the same markets as GPC

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gas to consumers by which they seek to replace the word "transportation" with "local distribution" — like "Midwestern contracted . . . to provide GPC with local distribution," SIGECO 2, or "the Court upheld [States'] authority to regulate an interstate pipeline's 'delivery service,' " mis-describing the *Panhandle* cases, Pet. 18, and misstating that the *Panhandle* cases hold "that States can exercise authority over 'bypass service' ", Pet. 7, 6. The mis-descriptions of facts and law are too many to correct.

and Scepter and no doubt purchases such gas in much, much larger quantities.[19]

What SIGECO is really seeking is exactly what Congress sought to avoid when it required FERC to take away monopoly power from the interstate pipelines, requiring them to unbundle and provide open access non-discriminatory transportation. Now SIGECO wants to have this monopoly power for itself and the other LDC's which would no doubt create the same anti-competitive conditions that existed prior to Order 636 and be subject only to regulation by Indiana so that the industrial consumers are captives to SIGECO. There can be no doubt that monopoly power in transportation will distort the competitive gas sales markets which Congress sought.

REASONS FOR DENYING OR DISMISSING THE PETITION

Question 1 — Presents Nothing But Petitioners' Concoctions. Finding no conflict between the decision of the Seventh Circuit and any of this Court or of the other circuits, petitioners embark upon a repetitious series of misquotes to create the illusion that the Seventh Circuit created a novel " 'seems' preempted" exception to *Younger*. These are patent misconstructions and this Court should summarily dismiss the Petition because there is no attempt to comply with S. Ct. Rule 14.1(a).

This Court in both *NOPSI* (where this Court found that the New Orleans City Council's actions were not clearly or facially seeking to regulate or interfere with wholesale rates) and in *Utility Commissioners of Ohio* (where this Court sustained enjoining the State Commission's actions and orders seeking to regulate wholesale rates which were clearly and facially preempted by the Federal Power Act), recognized that *Younger* abstention is not required where State proceedings or law is

19. *See In Re Southern Indiana Gas & Electric Company*, 2000 WL 33181398 at * 3 (Ind. URC 2000).

clearly, patently or facially invalid as encroaching upon exclusive federal jurisdiction.

The Seventh Circuit joined the holdings of the First, Sixth, Ninth and Eleventh Circuits pursuant to *Utility Commissioners of Ohio* and *NOPSI*[20] — that *Younger* abstention, which

20. P.App. 6a-7a, adopting *Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination*, 70 F.3d 1361 (1st Cir. 1995) (reversing the district court's abstention, holding: "a number of courts have held that *Younger* abstention is inappropriate where a claim of preemption is 'facially conclusive' and/or 'readily apparent', because no significant State interests are served. It is clear that the State tribunal has acted beyond the lawful limits of its authority."); *Bud Antle Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1995), *cert. denied*, 516 U.S. 1159 (1995) (reversing the district court's abstention under *Younger* where it was "readily apparent" that State agency's assertion of jurisdiction was preempted under Federal law); *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008 (6th Cir. 1994) (where the Court concluded that abstention is not required in a case presenting facially conclusive claims of Federal preemption), *Gartrell Construction Inc. v. Aubrey*, 940 F.2d 437, 441-42 (9th Cir. 1991) ("no significant State interest is served where the State law is preempted by Federal law and preemption is 'readily apparent.' . . . *Younger* abstention is not required. . . . Preemption is readily apparent under [Federal procurement regulation]"); *National Railroad Passenger Corp. v. State of Florida*, 929 F.2d 1532, 1537 & n.12 (11th Cir. 1991) ("in the present case, the new language of the Rail Passenger Service Act clearly indicates that State and local laws are preempted; thus, the District Court would not be required to abstain [under *Younger*] from enjoining any ongoing State criminal proceeding"); *Baggett v. Department of Professional Regulation, Board of Pilot Commissions*, 717 F.2d 521, 524 (11th Cir. 1993) (same); *Norfolk & W.Ry. v. Public Utils. Comm'n*, 926 F.2d 567, 573 (6th Cir. 1991) (determining that FRA preempted State administrative rule, preemption was "facially conclusive" so abstention not required); *see also Freehold Co.-Generation Associates v. Board of Regulatory Commissions*, 44 F.3d 1178-87 & n.6 (3d Cir. 1995), *cert. denied*, 516 U.S. 815 (1995) ("the alleged intrusive action is not by the federal government, but, on the contrary, by a state regulatory agency. We conclude that abstention is not appropriate in this case and does not

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"presupposes that the State has a valid interest that it is seeking to enforce," is not required

> if the State does not have such an interest, if for example, it is seeking to regulate activities that clearly are under exclusive federal control. . . . *See Chaulk Services, Inc. v. Massachusetts Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995) and cases cited there. . . . Mere defiance of clear federal law removing an area from potential State regulation is not such an interest.[21] [P.App. 6a-7a.]

Here, Indiana by statute, and SIGECO by the proceedings in question, seek to regulate the interstate transportation of user purchased gas in one State to the end-user's facility in another State. This, the Seventh Circuit found, adopting the three other circuits that had so held ("It seems to us, as it has seemed to the other courts to have addressed the issue, [*see* n.26, *infra*]") is the transportation of natural gas in interstate commerce within FERC's § 1(b) jurisdiction, which in accordance with this Court's decisions is exclusive, preempting State regulation. *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, 489 U.S. 493, 506-07 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988).

Not able to challenge the correctness of the Seventh Circuit's adoption of the facially clear exception to *Younger*

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warrant extended discussion"); *Communications Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (preemption must be "readily apparent" to prevent abstention).

21. Petitioners contend that *NOPSI* broadly defines the State's interest as being the "regulation of utilities" by the State, Pet. 10, but again selectively quote out of context, ignoring that the interest referenced in *NOPSI* is not simply regulating utilities but rather the more focused, limited State interest of "regulating *intrastate* retail rates" 461 U.S. at 377 (emphasis added).

and the adoption of the circuits which have found the interstate transportation of user- owned gas in one State to and including the last foot of transportation into the user's facility within FERC's exclusive jurisdiction, petitioners embark upon the concoction that the Seventh Circuit created a novel " 'seems' preempted" exception to *Younger*.

Petitioners' attribution of apparently dispositive significance to the single, commonplace phrase "It seems to us" in the Court of Appeals' opinion, while ignoring the parallel use "as it has seemed to the other courts" is at best is just plain silly — at worst, misleading. Pet. 12-13. As the parallel construction of this sentence demonstrates, the Seventh Circuit is describing its own holding ("It seems to us") in exactly the same terms as it is describing the holdings of the other circuits to address the issue. Petitioners do not and cannot contend that the opinions of these other circuits (*see* pp. 22-26, *infra*) are anything other than unequivocal holdings against petitioners' position. Described in the same terms ("seems"), so too is that of the Seventh Circuit — it is not a gratuitous "quick look", Pet. 11, 13, nor has it "lowered the bar to 'seems' preempted," Pet. 14, or to a "lax 'seems' preempted standard." Pet. 19.

Petitioners continue playing fast and loose in another "straw man" argument — the notion that the Seventh Circuit held the mere *assertion* of a preemption claim precludes *Younger* abstention. Pet. 13-14. The Court of Appeals again did nothing of the sort, but rather expressly recognized, in accordance with *NOPSI*, that any such rule "would be question begging." ("This is not to say that a defense of federal preemption automatically defeats *Younger*, the position rejected in [*NOPSI*]. That would be question begging. The State court has the same right and power to decide a defense of preemption as it does to decide any other federal defense") P.App. 6a-7a.

Petitioners then attack the circuits (now joined by the Seventh Circuit) on the facially clear or readily apparent exception to *Younger* as being a "full blown assault" by the

circuits on *Younger*. Pet. 13-14. (Petitioners do not and cannot identify a split in the circuits or identify even a single case supporting their own position, nor is this fairly within any question presented.) The "assault" is yet another figment of petitioners' imagination. These cases are based on *Younger*, *Utility Commission of Ohio*, and *NOPSI* and do no more than to recognize the necessity of a valid State interest as an "entry requirement" to the extraordinary circumstances needed to justify abstention in the first instance. (*See* n.20, *supra*.) The State perforce has no such interest where its actions clearly encroach upon an exclusive federal domain and are thus facially invalid. *Utilities Commission of Ohio* so holds with respect to State encroachment upon FERC's exclusive domain. 317 U.S. at 469. To say, as do the circuits' decisions, n.20, *supra*, that such facial invalidity of the State's asserted interest is "readily apparent", "conclusive", "facially conclusive", "clear", etc. are but different words for the same thing. Petitioners are casting about for error in the semantic nuances associated with synonymous terms without ever establishing a contravention of this Court's precedents.

Question 2 Presents Nothing. Much like Question 1, Question 2 is based upon a misconstruction that the Seventh Circuit rejected abstention "based on an appellate assumption" that the "regulatory commissioners are prosecuting the State proceedings to serve the commercial interest of a private utility. . . ." As set forth above, the Seventh Circuit's decision is well grounded, not based on any assumption. *See also*, *infra*, pp. 21-18. Obviously, there could have been no such assumption by the Seventh Circuit — the IURC is not prosecuting the State proceedings as petitioners represent. Quite the opposite, SIGECO brought all the proceedings, *see infra*, pp. 19-21. Petitioners voluntarily *stayed* SIGECO's proceedings "deferring the federal preemption issue for resolution by federal forums". M.App. 57a.

Question 3 Presents Nothing — SIGECO's Harassing, Vexatious Litigation. In Question 3, petitioners once again misconstrue, by taking out of context, several words in the Seventh Circuit's opinion. Petitioners assert that "in addition to its 'seems preempted' standard", the Seventh Circuit assertedly "swept away the rights of the State courts and agencies to decide the constitutionality of State laws" where a Federal agency "becomes first 'seised' of the dispute . . . to which the State is *not* a party." Pet. 19. Of course, Indiana was a party to the FERC proceedings. *See* n.15, *supra*.

But more importantly, the language upon which petitioners seize is but a part of the Seventh Circuit's analysis leading to its conclusions that the injunction sought by Midwestern "merely seeks to prevent vexatious litigation by a disappointed party, namely SIGECO, in the FERC regulatory proceeding," and that SIGECO "must be enjoined from harassing the purchasers and Midwestern by pursuing a State regulatory proceeding aimed at undoing the results of a Federal regulatory proceeding." P.App. 6a, 8a. These conclusions of the Seventh Circuit can only be viewed in the backdrop of its determination that *Younger* "has no application to a case such as this. . . , in which, . . . a **federal proceeding** (here before the Federal Energy Regulatory Commission) overlapping the state proceeding **reaches completion** while the state proceeding is still pending at an early stage".

The Court noted that SIGECO appeared in the FERC proceeding in which Midwestern sought certification, and made essentially all of the arguments against certification as it sought to raise in the Indiana proceedings, including that FERC should not rule before Midwestern received a certificate from the IURC. P.App. 5a.

So what confronted the Seventh Circuit, assertedly requiring abstention, ***was not*** merely IURC initiated proceedings against Midwestern with Midwestern running to federal court — the classical abstention case. Rather this case presents: (1) a first-

filed FERC case seeking the required FERC approval for unbundled interstate transportation of user-purchased gas in one State to the users' facilities in another State, (2) filed before SIGECO's petition to the IURC, (3) a FERC decision while the SIGECO petition had been voluntarily stayed by these petitioners' Order "deferring the federal preemption issue for resolution by federal forums," M.App. 57a, (which makes this case an inappropriate vehicle for this Court's consideration of any *Younger* issue), (4) in which FERC proceeding, the State appeared through the OUCC, (5) in which FERC proceedings SIGECO made all the various objections which it sought to remake before the IURC, (6) which FERC decision neither the State[22] nor SIGECO appealed as required to a federal circuit court of appeals, 15 U.S.C. § 717r(b) — and (7) SIGECO filed a further state court action against Midwestern, as well as two subsequent IURC proceedings against Midwestern, "aimed at undoing" the FERC decision.

If there was ever harassing, vexatious litigation, this case is it — *Younger* does not require abstention, unless *Younger* is "turned on its head"!

Interestingly, petitioners raise no error or challenge to the Seventh Circuit's determination that harassing, vexatious litigation does not require *Younger* abstention. Such has never been doubted in this Court's decisions. *Middlesex County Ethics Committee, etc. v. Garden State Bar Association*, 457 U.S. 423, 437 (1982) (because there was "no bad faith or harassment" or other exceptional circumstances dictating to the contrary, the federal court should abstain). Moreover, no principle of federal law, whether comity or statute,[23] is violated when state parties

22. "If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480, 97 S. Ct. 1898, 1904 (1977).

23. The situation presented here is similar to the "relitigation exception" recognized under the Anti-Injunction Act, 28 U.S.C. § 2283, (Cont'd)

and courts are enjoined from collaterally attacking final FERC orders. *See Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 259-60 (10th Cir. 1989), *cert. den.*, 497 U.S. 1003 (1990) (determining that an injunction should issue against State proceedings enjoining an interstate pipeline company from acting pursuant to a final FERC order which constituted an impermissible collateral attack on the FERC order, and abstention was inappropriate).

Seventh Circuit Correctly Determined FERC's Exclusive Jurisdiction Over Transportation Of User Purchased Gas In One State To User's Facility In Another State.

Petitioners and SIGECO want to exclude from FERC's interstate transportation — any transportation to an end-user, or the "last foot" into an end-user's facility.[24] No such language can be found in the NGA.

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which allows a federal court to enjoin state proceedings "that attempt to readjudicate previously decided matters" creating vested federal rights. *See, e.g., Ramsden v. Agribank*, 214 F.3d 865, 868 (7th Cir. 2000). Like *Younger*, the Anti-Injunction Act prescribes a point of demarcation at which comity concerns end and an enforcement of federal judgments creating vested federal rights begins. In face of Midwestern's federally adjudicated right pursuant to the FERC certificates to provide interstate transportation service to GPC and Scepter, no more than the Anti-Injunction Act do principles of comity animating *Younger* abstention prohibit issuance of an injunction against SIGECO's "vexatious" and "harassing" collateral attacks on the FERC decision. P.App. 6a, 8a.

24. Petitioners term this "direct delivery to a consumer", Petition p. 19, or "delivery service to an end-user consumer," Pet. 18, or "local delivery service" to end-use consumers. Pet. 17. SIGECO's view of the marketplace is that while the purchase of gas has been deregulated, the second step — transportation from the wellhead to the LDC — is within FERC's jurisdiction but the final step is always "local distribution by the LDC" reserved to the States. SIGECO Brief, p. 6. SIGECO wants the "direct local service to reach all customers" excluded from interstate transportation. SIGECO Brief 8.

The plain language of § 1(b) grants FERC jurisdiction over "transportation of natural gas in interstate commerce" and defines "interstate commerce" as "commerce between any point in a State and any point outside thereof. . . ." 15 U.S.C. § 717a(7). The language and its applicability to the transportation of user-purchased natural gas in one State to the user's facility in another State is clear, unquestionable. It is, therefore, no surprise that petitioners can find no support in § 1(b) or any case of a Circuit Court of Appeals or of this Court[25] that the last foot of unbundled transportation of user-purchased gas in one State to the user's facility in another, is other than transportation in interstate commerce. Just as the Seventh Circuit found FERC's jurisdiction to be clear and exclusive, other circuits have likewise found FERC's jurisdiction over such unbundled transportation into the user's facility to be "undoubtable" "hardly conceivable" to find a better fit, "clearly within FERC's transportation jurisdiction".[26] This Court similarly found such

25. Petitioners reliance on *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) is simply wrong. *Tracy* did not rule on any issue in this case. In addition to acknowledging the holding of the circuits at n.14, this Court also noted the legislative changes since 1938 and that there might be questions raised by such and "we do not decide this issue," 519 U.S. at 305, n.13, and further noted that § 1(b) "remains unchanged," 519 U.S. at 305, n.13 but did not discuss that 15 U.S.C. § 3431 limited § 1(b) and other provisions of the NGA from applying to "first sales". Petitioners' reliance on *Panhandle-Indiana* and *Michigan* is also wrong. These cases said nothing of "local delivery service" being outside FERC's jurisdiction. Both decisions were grounded in § 1(b)'s grant of only wholesale, but not retail, sales jurisdiction to FERC and said nothing whatever about unbundled interstate transportation. Indeed, this Court in *Tracy* repeatedly described these cases as recognizing the power of States "to regulate all in-State gas sales directly to consumers. . . ." 519 U.S. at 281. Of course, the NGPA/NGWDA raise issues as to whether States can regulate "first sales", whether in-State or out-of-State in the new competitive national market. *See* n.8, *supra*.

26. *See Michigan Consol. Gas Co. v. Panhandle Eastern Pipeline Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (Cont'd)

within FERC's jurisdiction. *FPC v. Transcontinental Gas Pipeline, supra.*

There is no limitation on FERC's interstate transportation jurisdiction based on whether the gas is to be consumed or resold or whether it is the "last foot" to consumption. "The Act gives the Commission **jurisdiction** over interstate transportation of natural gas as a separate and distinct matter, whether

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(1990) (Michigan PSC enjoined from asserting jurisdiction over FERC certificated unbundled interstate transportation of user-owned gas to user's facility where the Court found it "hardly conceivable" to find a better fit with FERC's interstate transportation jurisdiction); *Michigan Consolidated Gas Company v. FERC*, 883 F.2d 117, 120 (D.C. 1989), *cert. denied*, 494 U.S. 1079 (1990) (the Court had "no difficulty" affirming FERC's jurisdiction to grant a certificate of convenience and public necessity for the interstate transportation to a user's facility); *Public Utility Commission of California v. FERC*, 900 F.2d 269, 273-77 (D.C. Cir. 1990) (unbundled interstate transportation of user-owned gas is transportation of natural gas in interstate commerce does not end at the "last foot of pipe" before going into the end-user's facility); and *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1416 (10th Cir. 1992) (FERC has exclusive jurisdiction to authorize unbundled transportation services for user-owned gas to the user's facility as such "undoubtedly falls within" FERC's interstate transportation jurisdiction). *See also United Distribution Companies v. FERC, supra*, (FERC has interstate transportation jurisdiction over LDCs' capacity sales to their own end-users because gas sales element was severed, unbundled from the transaction, with FERC retaining jurisdiction over interstate transportation component, 88 F.3d at 1153, and sustaining FERC's exclusive transportation jurisdiction and regulatory preemption of States with respect to LDCs' buy/sell agreements with their users, *id.* at 1154-55); *National Fuel Gas Supply Corporation v. Public Service Commission of New York*, 894 F.2d 571, 579 (2d Cir. 1990), *cert. denied*, 497 U.S. 1004, 1105 S. Ct. 3240 (1990) (FERC has exclusive jurisdiction concerning replacement of 1.6 miles of interstate pipeline and not required to obtain a State environmental certificate because FERC has the authority to consider environmental issues, "State may not engage in concurrent site specific environmental review;" and *see also American Gas Association, supra*, and *Associated Gas Distributors, supra.*

the transportation is for hire or for sale and whether this sale is for consumption or resale." *United Pipeline Company v. Federal Power Commission, et al.*, 385 U.S. 83, 89 (1966). The independent jurisdictional grant over interstate transportation allows **FERC jurisdiction over** curtailment plans for both jurisdictional wholesales **and non-jurisdictional retail sales**, because the Act does not limit the interstate transportation jurisdiction, as it does the sales jurisdiction. *See Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) ("Though the [NGA's] application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale."), approved in *New York, supra*, 112 S. Ct. at 1022.

Just last month, in *New York, et al. v. Federal Energy Regulatory Commission, et al., supra*, based on similar unambiguous language in a nearly identical provision of the Federal Power Act, 16 U.S.C. § 824(b), this Court affirmed FERC's regulation of unbundled retail electric transmissions based on FERC's exclusive jurisdiction over "the transmission of electric energy in interstate commerce. . . ." 16 U.S.C. § 824(b), *see* n.2, *supra*.

> The statutory text thus unambiguously authorizes FERC to assert jurisdiction over two separate activities — transmitting and selling **[just as does the NGA over transportation and selling].** It is true that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market **[as under the NGA for gas]**. However, FERC's jurisdiction over electric transmission contains no such limitation **[neither does the NGA for transportation].** Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer **[as does the**

> **NGA over interstate transportation]**, FERC's exercise of this power is valid. [112 S. Ct. at 1024].

Change the words "transmission" to "transportation" and "electric" to "gas", and the cases are indistinguishable.

Petitioners' reliance on the terms "local distribution" in the proviso portion of § 1(b) (much like the proviso language of the FPA) to encompass the last foot of interest transportation to an end-user was rejected in all of the circuit court cases (and in *New York*, *supra*, under the FPA).[27] This Court has repeatedly held the proviso language is "surplusage" and does not limit "any jurisdiction otherwise granted under § 1(b)" and is to be strictly construed. *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 471 (1950) (the terms "local distribution" in the proviso were "surplusage which was 'not actually necessary' "); *Federal Power Commission v. Louisiana Power & Light Co., et al.*, 406 U.S. 621, 638 (1972) ("it is well established that the proviso was added to the Act merely for

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27. *Public Utilities Commission of California*, *supra*, 900 F.2d at 276 (distribution conjures up receiving a large quantity of some good and parceling it out among many takers. The legislative history of the Natural Gas Act supports this view and undercuts any suggestion that final delivery to an end-user transfers the terminal stage of transportation into distribution); *Cascade Natural Gas*, 955 F.2d at 1418-21 ("local distribution' as Congress viewed the term, involves two components, the retail sale of natural gas and its local delivery, normally through a network of pipelines designed to supply local consumers" such that "by-pass transactions did not entail the realm of local retail sales that Congress intended to reserve to the States" *Michigan Consolidated Gas Co.*, *supra*, 883 F.2d at 121-22 (rejecting the argument that by-pass to an end-user involves "local distribution" where the gas was purchased out-of-State from third parties and the pipeline merely transported the gas into an end-user in interstate commerce). *See also Oklahoma Natural Gas Co. v. Federal Energy Regulatory Commission*, 906 F.2d 708, 710 (D.C. Cir. 1990) (local distribution is "a network of small local lines used to transmit gas from a large interstate pipeline to individual consumers spread out in a local geographic area — not a high pressure line connecting an interstate pipeline to a single end-user").

clarification and was not intended to deprive FPC of any jurisdiction otherwise granted by § 1(b)."); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1954) ("we noted that '[e]xceptions to the primary grant of jurisdiction in § 1(b)(1) ought to be strictly construed' "); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690-91 (1947) (same).

The Circuit Courts of Appeal have uniformly held that the meaning of "local distribution" is not merely transportation to an end-user, but the breaking down, parceling out *and sale* of gas to multiple users in a local area, n.27, *supra*. "Insofar as Congressional committees spoke to the matter, therefore, they appear to have viewed distribution as confined to its parceling out function (and probably) even more narrowly, to parceling out accompanied by retail sales." *Public Utility Commission of California*, 900 F.2d at 276 (emphasis in original).

Merely because transportation is provided by local distribution companies to gas users does not mean that it is not the transportation of natural gas in interstate commerce — interstate transportation jurisdiction extends to the local distribution companies' sales of unbundled transportation capacity to the their own end-users where the gas sales element and the transportation element are severed, unbundled with FERC maintaining jurisdiction over the interstate transportation element. *See United Distribution Companies v. FERC*, *supra*, 88 F.3d at 1150-56 (sustaining various aspects of Order 636's mandatory unbundling and that the interstate transportation jurisdiction extends to FERC's regulation of local distribution companies' capacity sales and buy/sell arrangements of transportation to their end-users, and preempts State regulation to the contrary.)

Aside from the clear language in § 1(b), later provisions of the NGPA and the NGWDA also demonstrate that FERC's interstate transportation jurisdiction encompasses the last foot of transportation of user-owned gas from out-of-State into the user's facility in-State. For instance, consistent with the historical

definition of local distribution, Congress in the NGPA expressly defined "distribution companies" as engaged in the breaking down and parceling out of natural gas and sales for consumption. *See* NGPA § 2(17), where Congress defined a local distribution company as "any person, other than an interstate pipeline or intrastate pipeline engaged *in the transportation*, or local distribution, of natural gas *and the sale* of natural gas for ultimate consumption." 15 U.S.C. § 3301(17) (emphasis added). Nothing in this definition indicates that Congress ever considered transportation of user-owned gas to an end user for consumption (or at the "last foot") to be the domain of local distribution.

In 1978 as a part of the Congressional effort to attack the imbalances in the natural gas supply, Congress amended NGA § 7 to allow FERC to give preference or discriminate in certificating unbundled interstate transportation of user-owned gas to high priority users' facilities. 15 U.S.C. § 717f(c)(2); M.App. 1a-2a. If FERC did not have jurisdiction over transportation of user owned gas in interstate commerce into an end-user's facility pursuant to § 1(b), the amendment would make no sense. Concurrently, in the 1978 NGPA, Congress sought to protect previous certifications for unbundled transportation of user-owned natural gas into utility generation units by prohibiting FERC from revoking any earlier granted certificate for such transportation into generating facilities to replace coal because of such use being an unpreferred use, i.e. gas versus coal.. 15 U.S.C. § 3394(a): "[T]he Commission may not . . . revoke or amend any certificate of public convenience and necessity issued before January 1, 1969 under Section 7 of the Natural Gas Act . . . for the transportation of natural gas owned by any electric utility . . ." for a ten year period after November 9, 1978. App. at 3a. Again, Congress recognized FERC's § 1(b) interstate transportation authority over the transportation of user-purchased gas in one State into the user's facility in another State.

Finally, in the 1992 Energy Policy Act, Congress expressly affirmed the competition which it had encouraged, not only in the integrated, competitive and unregulated national gas market, but also competition in transportation markets. Congress considered further amendments to the NGA and NGPA as a part of the Energy Policy Act of 1992 including requiring 60 day notice to an LDC of a prospective bypass so state commissions could consider providing more flexible rates for a LDC to compete. *See* House Rept. No. 102-474(I) re proposed Sec. 204, "Rules in Local Distribution Bypass Cases." 1992 USCCAN 1953 (102nd Cong., 2d Sess., 1992) Instead, Congress enacted a declaration that "natural gas consumers and producers, and the national economy, are best served by competitive natural gas wellhead market." P.L. 102-486, Sec. 202, entitled "Sense of Congress".[28]

In sum, Congress has created an integrated, deregulated competitive national market for the sale and purchase of natural gas, including sales to any end-user. It also recognized that for there to be a market where the lowest cost producers could reach the highest bidding purchasers, and vice versa, FERC had to require unbundled, open access transportation. This allowed the LDC's and the industrial users to bypass the interstate pipelines and purchase gas from others in the integrated national market.

Petitioners and SIGECO now argue the last foot of interstate transportation to any consumer is subject to State jurisdiction. If this is true, then all Congress accomplished in the last 25 years is to transfer the "market function subject to market power" — that is, a monopoly power — from the interstate pipelines to the LDC's and to exclusive State jurisdiction.

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28. Here, there is no plain meaning to overcome. In fact, the plain meaning is established independently of the foregoing. *See Solid Waste Agency of Northern Cook County v. United States Army Corp.*, __ U.S. __, 121 S. Ct. 675, 681 (2001).

That is ridiculous. If this were true, Congress would have changed it, too.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be dismissed or denied.

Respectfully submitted,

JANET K. PLACE
General Counsel
NORTHERN PLAINS NATURAL GAS COMPANY
1111 South 103rd Street
Omaha, Nebraska 68124-1000
(402) 398-7886

G. DANIEL KELLEY, JR.
Counsel of Record
WILLIAM P. DIENER
EDWARD P. STEEGMANN
ICE MILLER
One American Square
Box 82001
Indianapolis, Indiana 46282
(317) 236-2100

Attorneys for Respondent
Midwestern Gas Transmission Company

APPENDIX

APPENDIX A — ADDITIONAL STATUTORY PROVISIONS

15 U.S.C.A. § 717. Regulation of natural gas companies

* * *

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * *

15 U.S.C.A. § 717f. Construction, extension, or abandonment of facilities

* * *

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities

or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of —

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

* * * *

15 U.S.C.A. § 3394. Limitation on revoking or amending certain pre-1969 certificates of public convenience and necessity

(a) General rule

The Commission may not, during the 10-year period beginning on November 9, 1978, revoke or amend any certificate of public convenience and necessity issued before January 1, 1969, under section 7 of the Natural Gas Act [15 U.S.C.A. 717f] for the transportation of natural gas owned by any electric utility except upon the application of the person to whom such certificate was issued.

* * * *

Appendix A

15 U.S.C.A. § 3431. Coordination with the Natural Gas Act

(a) Jurisdiction of the Commission under the Natural Gas Act

(1) Sales

(A) Application to first sales

For purposes of section 1(b) of the Natural Gas Act [15 U.S.C.A. § 717(b)], the provisions of the Natural Gas Act [15 U.S.C.A. § 717 et seq.] and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas.

* * * *

Ind. Code § 8-1-2-87 Gas utilities; necessity certificates; requirements

Sec. 87. (a) When used in this section, unless the context otherwise requires:

(1) The term "gas" means natural gas, artificial or manufactured gas, and mixed gas.

(2) The term "necessity certificate" means a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this section, which certificate shall be deemed an indeterminate permit.

Appendix A

(3) The term "rural area" means territory within the state of Indiana that is outside the corporate limits of a municipality.

(4) The term "gas utility" means and includes any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the state of Indiana for his, its or their domestic, commercial, or industrial use.

(5) The term "gas distribution service" means the furnishing or sale of gas directly to any consumer within the state of Indiana for his or its domestic, commercial, or industrial use.

(b) It is hereby declared that in order adequately to protect the public interest in the distribution of gas to consumers within the state of Indiana, it is necessary and desirable that to the extent provided in this section the holding of necessity certificates should be required as a condition precedent to the rendering of gas distribution service in rural areas of the state of Indiana.

(c) After February 26, 1945, no gas utility shall commence the rendering of gas distribution service in any rural area in the state of Indiana in which it is not actually rendering gas distribution service on February 26, 1945, without first obtaining from the commission a necessity certificate authorizing such gas distribution service, defining and limiting specifically the rural area covered thereby, and stating that public convenience and necessity require such gas distribution service within such rural area by such gas utility; and no gas utility required by this section to hold a

necessity certificate for any rural area shall render gas distribution service within such a rural area to any extent greater than that authorized by such necessity certificate or shall continue to render gas distribution service within such a rural area if and after such necessity certificate has been revoked or transferred as in this section provided.

* * * *

Ind. Code § 8-1-2-87.5 Transportation of gas; necessity certificate; application; public hearing; grounds for granting certificate; revocation

Sec. 87.5. (a) For purposes of this section, "transportation of gas" means physical transmission, exchange, backhaul, displacement, or any other means of transporting gas, including gathering.

(b) Any person, corporation, or other entity that:

(1) is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state;

(2) is engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers; or

(3) is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed;

is a public utility as defined in section 1 of this chapter and must obtain a necessity certificate from the commission before it may engage in any activities described in this subsection. This subsection does not apply to a gas utility operating pursuant to an indeterminate permit or necessity certificate issued under section 87 of this chapter, nor to the production, sale, and gathering of natural gas produced in Indiana.

Ind. Code § 8-1-2-87.6 Exemption of Indiana produced natural gas; petition and hearing on rates for purchase or transport

Sec. 87.6. (a) Except as provided in this section, the production, gathering, sale, or transportation of Indiana produced natural gas is exempt from this chapter.

(b) Any person, corporation, or other entity engaged in the production, gathering, sale, or transportation of natural gas produced in Indiana may petition the commission to:

(1) require a gas utility certified under section 86 or 87 of this chapter to purchase or transport Indiana produced natural gas owned by the petitioning entity; and

(2) set the rates for the purchase or transportation of that gas.

* * * *

APPENDIX B — OPINIONS, ORDERS AND NOTICES OF THE FEDERAL ENERGY REGULATORY COMMISSION ISSUED DECEMBER 16, 1998

Commission Opinions, Orders and Notices

Midwestern Gas Transmission Company

Docket No. CP98-538-000

Order Authorizing Construction and Operation of Facilities Under Blanket Certificate and Denying Protests

(Issued December 16, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt H (acute)ebert, Jr.

On May 12, 1998, Midwestern Gas Transmission Company (Midwestern) filed a prior notice request pursuant to its Part 157 blanket certificate issued in Docket No. CP82-414-000[1] and the prior notice procedures provided in Sections 157.205 and 157.211 of the Commission's regulations, for authorization to construct and operate a delivery tap, a delivery lateral, and a meter station. The proposed facilities will be used to transport and deliver gas to a new customer, Grain Processing Corporation (GPC), an industrial end-user. In accordance with the discussion below, we will grant Midwestern's request.

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1. 20 FERC P 62,411 (1982). Southern Indiana Gas and Electric Company argues in its protest that Midwestern erroneously relies on a blanket certificate issued in Docket No. CP82-412-000 to Midwestern's affiliate, East Tennessee Natural Gas Company. Although Midwestern inadvertently used the East Tennessee docket number in its prior notice application, we are authorizing Midwestern's request under its blanket certificate which was issued in Docket No. CP82-414-000.

Appendix B

I. Background and Proposal

Midwestern is a natural gas company under the Natural Gas Act (NGA), engaged in the transportation of natural gas in interstate commerce and the construction of facilities for the transportation of gas pursuant to Part 284 and Part 157, respectively, of the Commission's regulations.

GPC is a manufacturer and marketer of various corn-based products. It is constructing a new corn processing plant in Daviess County, Indiana that it intends to make fully operational during the summer of 1999. GPC plans to begin receiving natural gas supplies in early 1999 to test its new equipment before the plant becomes fully operational. GPC requested service from Midwestern which then filed the prior notice request at issue in this proceeding.

Midwestern proposes to install an 8-inch hot tap on its 30-inch diameter, 2100 Line in Knox County, Indiana, on its existing right-of-way; install 2.84 miles of 8-inch lateral line extending from the proposed hot tap to GPC's new plant in Daviess County, Indiana; and install a meter station with dual 6-inch orifice meter runs and electronic gas measurement equipment (EGM) on a site provided by GPC. Midwestern proposes to own, operate, and maintain the hot tap, interconnecting pipeline, meter station and EGM.

In addition, Midwestern proposes to construct and install a dual run, two-stage pressure regulator, gas heating facilities and odorization facilities which GPC will own, operate, and maintain.

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Midwestern states that the project will cost approximately $2,760,000 for which it will be reimbursed by GPC. The proposed lateral would have a maximum volume of 40,000 Dth of natural gas. Midwestern plans to deliver up to 10,000 Dth/d of natural gas to GPC.

During the winter of 1998/1999, Midwestern proposes to commence delivery of small amounts of gas to GPC to test GPC's plant processing equipment pursuant to an interruptible gas transportation agreement under Midwestern's Rate Schedule IT. When GPC's plant begins full operation during the summer of 1999, Midwestern will provide service pursuant to a firm transportation agreement under Midwestern's Rate Schedule FT-A.

Midwestern states that it does not expect the addition of the proposed facilities to have any significant impact on its peak day and annual deliveries. Further, Midwestern states that it will have sufficient capacity to accomplish deliveries to GPC without detriment or disadvantage to its other customers.

II. Interventions, Protests and Answers

Pursuant to Section 157.205(i), authorization to construct and operate qualifying facilities under a blanket certificate is automatic provided no protests to the activity are filed within 45 days of the date notice is issued by the Commission. If a protest is filed, authorization is granted if the protest is withdrawn within 30 days after the 45-day notice period.[2]

2. See Sections 157.205(h) and (I)(2) of the Commission's regulations.

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If a protest is not withdrawn, the prior notice request proceeds as an application for case-specific authorization.[3]

On June 1, 1998, in accordance with Section 157.205 of the Commission's regulations, notice of Midwestern's prior notice request was published in the Federal Register (63 Fed. Reg. 29723). Within the 45-day notice period provided by the prior notice procedures, timely, unopposed motions to intervene were filed by the Indiana Office of Utility Consumer Counselor; GPC; Proliance Energy, LLC; Northern Indiana Public Service Company (NIPSCO); and Southern Indiana Gas & Electric Company (SIGECO).[4] SIGECO filed a request for an evidentiary hearing.

NIPSCO and SIGECO also filed protests to Midwestern's proposal which they have not withdrawn. They argue that Midwestern's construction and operation of the lateral pipeline without state authorization would violate Indiana law. Further, they contend that Midwestern's proposal may be anti-competitive, lacks market support, would result in wasteful duplication of facilities, would increase costs borne by SIGECO's customers, and would have substantial adverse environmental impact.

Midwestern and GPC filed answers to the protests. SIGECO filed a response and motion requesting the Commission to accept the pleadings SIGECO filed with the

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3. See Section 157.205(g) of the Commission's regulations.

4. Timely, unopposed motions to intervene are granted by the operation of Rule 214 of the Commission's regulations (18 C.F.R. § 385.214).

Indiana Utilities Regulatory Commission (IURC) that are related to this proceeding. Midwestern and GPC filed answers and motions requesting the Commission to accept the pleadings they filed with the IURC. While our rules do not permit answers to protests or to answers,[5] we may, for good cause, waive a rule.[6] We find good cause to do so in this instance. To ensure a complete and accurate record, we will accept all pleadings tendered to date for filing.

III. Discussion

A. Jurisdiction

SIGECO contends that Midwestern's construction and operation of the proposed lateral pipeline without state authorization would violate Indiana law. SIGECO states that it has filed a pending petition before the IURC, arguing the point.[7] SIGECO contends that Indiana law requires Midwestern, as a gas utility in Indiana, to obtain a certificate

5. See 18 C.F.R. § 385.213(a)(2).

6. 18 C.F.R. § 385.101(e).

7. SIGECO filed a petition with the IURC requesting that it issue an order directing Midwestern "to cease and desist from engaging in the rendering of gas service in rural areas of Indiana, including the transportation of gas from outside Indiana for direct sale or delivery to consumers within the state" on grounds that Midwestern's proposed service to GPC would violate Indiana Code sections 8-1-2-87 and 8-1-2-87.5. Midwestern has moved to dismiss SIGECO's petition arguing that the IURC has no authority to require Midwestern to receive state authorization before it may provide the service proposed in this proceeding.

of public convenience and necessity from the IURC since Midwestern would be transporting natural gas from outside Indiana for direct delivery to an end-user within the state.[8]

SIGECO cites Public Service Commission of Indiana v. Panhandle Eastern Pipe Line Company (Indiana v. Panhandle) to support its argument that certain activities of natural gas pipeline companies are subject to IURC regulation.[9] SIGECO maintains that the Indiana state court found, and the United States Supreme Court affirmed, that the business of transporting and selling natural gas for ultimate distribution to the public is affected with the public interest mandating state regulation and control. Further, the court found Panhandle to be a public utility subject to state regulation with respect to direct sales to end-users.

SIGECO and NIPSCO argue that the Commission should not act on Midwestern's application until after the IURC issues a final order in response to SIGECO's petition before the IURC. They contend that the IURC should have the initial opportunity to apply state law to the facts of this case and that the IURC's findings are material to the Commission's public convenience and necessity analysis.

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8. Citing Indiana Code, Section 8-1-2-87.5 which states: [a]ny person, corporation, or other entity that is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end-use consumer or consumers within this state must obtain a necessity certificate from the [IURC] before it may engage in [such transportation of gas].

9. 71 N.E. 2d 117 (Ind.), aff'd, 332 U.S. 507 (1947).

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SIGECO states that many of the issues before the Commission, including the application of Indiana law to Midwestern's application, the extent to which the NGA may preempt aspects of state law, and the manner in which these jurisdictional boundaries should be drawn with regard to this project, are also pending before the IURC. SIGECO contends that the Commission should defer further action on Midwestern's application pending a decision from the IURC on the issues of state law and the appropriate division between state and federal authority as it applies to the facilities and services proposed by Midwestern.

In that regard, SIGECO submits that the Commission has shown substantial deference to state commissions on jurisdictional determinations. For example, it states, in Order No. 888, the Commission acknowledged in the electric regulation context that defining the boundary between state and federal jurisdiction would be highly case-specific, and indicated that it would defer generally to state commissions, applying the Commission's seven local distribution indicators, to determine "where to draw the jurisdictional line" as to public utilities providing electric transmission service.[10]

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10. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 P 31,036, at pp. 31,783-84 (1996), order on reh'g, FERC Statutes and Regulations P 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC P 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC P 61,046 (1998).

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Midwestern and GPC respond that no portion of the service Midwestern proposes to provide to GPC involves the local distribution of gas. Rather, they maintain, Midwestern will provide interstate transportation of natural gas directly to an end-user and thus the service is subject to the Commission's exclusive NGA jurisdiction.

Commission's Response

Section 1(b) of the NGA gives the Commission jurisdiction over the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and the natural gas companies engaged in such transportation or sale.[11] Section 1(b) reserves to the states jurisdiction over any other sale of natural gas and the local distribution of gas.

Further, the Commission's jurisdiction, where it applies under the NGA, is exclusive.[12] Thus, the Commission has exclusive jurisdiction over the transportation of natural gas in interstate commerce and the facilities used for such transportation.[13]

11. 15 U.S.C. § 717(b).

12. See Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, 109 S.Ct 1262, 1274 (1989); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-01 (1988) (Schneidewind); Northern Natural Gas Co., v. State Corporation Commission of Kansas, 83 S.Ct. 646, 650 (1963); Public Utilities Commission of California v. FERC, 900 F.2d 269, 274 (D.C. Cir. 1990) (California PUC); National Fuel Gas Supply Corp. v. Public Service Commission of New York, 894 F.2d 571, 576-77 (2d Cir. 1990), cert. denied, 497 U.S. 1004 (1990) (National Fuel).

13. Schneidewind, 485 U.S. at 299-301; National Fuel, 894 F.2d at 576-77.

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In interpreting the NGA and its legislative history, the Commission and the courts consistently have held that the transportation of natural gas by an interstate pipeline directly to an end-user constitutes transportation in interstate commerce, not local distribution, and, as such, is subject to the Commission's exclusive jurisdiction.[14] Both the Commission and the courts consistently have concluded that tie-in facilities such as valves, meters and lateral lines (i.e., the facilities Midwestern proposes to construct to serve GPC) which are integrated with a pipeline's interstate transmission system, and which are designed to connect such pipeline system to an end-user, are not local distribution facilities.[15]

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14. See Cascade Natural Gas Corp. v. FERC (Cascade), 955 F.2d 1412, 1417-19; Oklahoma Natural Gas Co. v. FERC (ONG), 906 F.2d 708, 710 (D.C. Cir. 1990); Public Utilities Commission of California v. FERC (California PUC), 900 F.2d 269, 277 (D.C. Cir. 1990); Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117, 121-22 (D.C. Cir. 1989), cert. denied 494 U.S. 1079 (1990); Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 689 F.Supp. 729,732-38 (W.D. Mich. 1988), aff'd, 887 F.2d 1295, 1300-01 (6th Cir. 1989, cert. denied, 494 (1990); KN Wattenberg Transmission Limited Liability Co. (KN Wattenberg), 81 FERC P 61,167, at pp. 61,739-90 (1997); Panhandle Eastern Pipe Line Co., 64 FERC P 61,211 (1993); Mojave Pipeline Co., 41 FERC P 61,040, at pp. 61,116-18 (1987), order on reh'g, 42 FERC P 61,351, at p. 62,002 (1998) (Mojave).

15. ONG, 906 F.2d at 710 (lateral line connecting interstate pipeline to end-user is not a local distribution line); California PUC, 900 F.2d at 277 (acts which constitute interstate transportation remain as such even though they end in deliveries to end-users through tie-in facilities); KN Wattenberg, 81 FERC at p. 61,739 (a lateral is not

(Cont'd)

Further, in determining where interstate transportation ends and local distribution begins, the Commission has stated that the term "local distribution facility" connotes a network of small local lines used to transmit gas from a large interstate pipeline to individual consumers spread out in a local geographic area — not a high-pressure line connecting an interstate pipeline to a single end-user. The courts have agreed: "[d]istribution conjures up receiving a large quantity of some good and parcelling it out among takers."[16]

In FPC v. East Ohio Gas Company (EastOhio),[17] the United States Supreme Court held that Commission jurisdiction extended over "the high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains."[18] In California PUC, the court held that "acts which constitute transportation for Section 1(b) purposes under East Ohio remain such even though they end in delivery

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(Cont'd)
a local distribution facility); Williams Natural Gas Co., 46 FERC P 61,160, at p. 61,559 (lateral which connects mainline to end-user is an essential and integral element of the interstate transportation of natural gas).

16. California PUC, 900 F.2d at 276; ONG, 906 F.2d 710.

17. 338 U.S. 464 (1950).

18. Id. at 470. In response to the Court's finding in East Ohio, Congress later amended the NGA by creating the Hinshaw exception which exempts from the Commission's jurisdiction transportation by a company that operates exclusively in one state if its rates and services are regulated by the state. See NGA § 1(c) 15 U.S.C. § 717(c).

(at high pressure) to end-users."[19] The circuit court distinguished a 1951 United States Supreme Court case that upheld Michigan's power to veto the retail sale by an interstate pipeline to a large end-user despite exclusive federal jurisdiction over the interstate transportation of the gas[20] on the basis that the transaction at issue involved the bundled sale of gas to the end-user.[21] The court stated that "under modern conditions where the end-user often owns the gas and uses the pipeline solely for transportation, application of East Ohio removes this fulcrum for state power."[22] In Cascade, the court declined to decide the jurisdictional issue based on the pressure in the line but instead relied on the fact that the pipeline's bypass of an LDC to directly serve an end-user involved only interstate transportation and did not involve a retail sale of gas by the pipeline to the end-user.[23]

Thus, under any of these lines of reasoning, Midwestern's proposed service to GPC constitutes interstate transmission of natural gas, not local distribution. Midwestern will deliver the gas to GPC at mainline pressure, there is no retail sale by Midwestern to GPC, and Midwestern will not deliver the gas through a network of small local lines connected to individual consumers within a local geographic area.

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19. 900 F.2d at 277.

20. Panhandle v. Michigan, 341 U.S. 329 (1951).

21. 900 F.2d at 277.

22. Id.

23. 955 F.2d at 1420.

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SIGECO's reliance on Indiana v. Panhandle is misplaced. In that case, the Court found that states have jurisdiction over a pipeline's direct sale of natural gas to an end-user. Midwestern is not proposing to make direct sales to GPC; its proposal involves only interstate transportation of gas. Further, the courts and the Commission have explicitly found that Indiana v. Panhandle is inapposite where the pipeline is merely transporting gas supplies directly to an end-user as in this case.[24]

SIGECO's reliance on Order No. 888 to support its argument that the Commission should defer to the IURC regarding our jurisdiction over Midwestern's proposed facilities and transportation service is equally unavailing. In Order Nos. 888 and 888-A, the Commission never stated that it would defer to states in determining whether the Commission or the state has jurisdiction over electric transmission. Indeed, the Commission emphasized that "if unbundled retail transmission in interstate commerce occurs voluntarily by a public utility or as a result of a state retail access program, the Commission has exclusive jurisdiction over the rates, terms and conditions of such transmission."[25] Rather, the Commission explained that, where states unbundle retail sales, "it will give deference to their determinations as to which facilities are transmission and which are local distribution," provided the states making such determinations apply the seven criteria established by the

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24. Cascade, 955 F.2d at 1417-19; Panhandle Eastern Pipe Line Co., 42 FERC P 61,076, at pp. 61,389-49 (1988).

25. Order No. 888-A at p. 30,335.

Commission in Order No. 888,[26] and it did so in order to allocate costs and set rates properly for both transmission and local distribution services.[27]

The circumstances discussed in Order Nos. 888 and 888-A do not parallel those at issue in this proceeding. In Order Nos. 888 and 888-A, the Commission was addressing unbundled retail transmission and the deference to be accorded a state regulatory authority's recommendations for drawing of a jurisdictional line between Commission-jurisdictional and state-jurisdictional facilities for purposes of allocating costs and setting rates.[28] Here, in contrast, we are not dealing with a state-approved unbundling of retail sales or the cost allocation and ratemaking consequences of such action by a state.

SIGECO contends that Midwestern's and GPC's argument that the Commission has exclusive jurisdiction over interstate transportation does not necessarily divest the IURC of its jurisdiction over Midwestern's proposal. SIGECO points to General Motors v. Tracy (Tracy), in which the United States Supreme Court discussed the evolution of state and federal regulation of natural gas markets, including the changes that have enabled large industrial customers to contract to receive service directly from interstate pipelines, rather than from an LDC.[29] According to SIGECO, the Court states that these

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26. Id.

27. Id. at pp. 30,336-37.

28. Id. at pp. 30,336-37.

29. 117 S.Ct. 811 (1997).

regulatory changes did not undermine the states' authority over matters that affect the service to be provided to captive customers served by LDCs.[30] Further, SIGECO contends, the Court stated that the rate impact on an LDC's captive customers resulting from a large industrial customer choosing to avoid service from an LDC had an impact on local interests sufficient to support regulation by the state. Finally, SIGECO maintains, the Court specifically refused to endorse decisions of various courts of appeal that have ruled that the Commission has sole authority to regulate bypass transactions where the sale of gas occurs outside of the state and the interstate pipeline company merely transports gas to the industrial customers.[31]

SIGECO's argument that the Supreme Court's decision in Tracy supports SIGECO's position that the IURC has the authority to review Midwestern's proposal is without merit. Tracy did not address the specific issue raised by SIGECO in this proceeding. In Tracy the Court was addressing a challenge to Ohio's sales tax exemption for gas sales made by state-regulated LDCs, but not for sales by gas marketers. The issue was whether the opportunities for competition between gas marketers and LDCs to supply gas to end-users

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30. Id. at 817.

31. Id. at n.14. (Specifically, the Court cites Cascade, 955 F.2d at 1414-1422; Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 887 F.2d 1295, 1299-1301 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990); Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117, 121-122 (D.C. Cir. 1989), cert. denied, 494 U.S. 1079 (1990). The Court stated "[w]e express no view on the correctness of these decisions").

require treating them as similarly situated for Commerce Clause purposes. The Court held that they were not similarly situated for claims of facial discrimination since the LDCs' state-regulated bundled gas product was sufficiently distinguished from the independent marketers unbundled gas sales. Therefore, Ohio's tax on independent marketers' gas sales did not violate the Commerce Clause.

In support of its conclusion that states have a legitimate interest in regulating gas sales to consumers, the Court referenced the NGA's mandate that states have the authority to regulate retail sales of natural gas (including direct sales to industrial customers) and its prior decisions upholding such mandate.[32] The Court recognized, however, that the NGA and the Commerce Clause prohibit the states from regulating the interstate transportation of natural gas.[33] Nowhere did the Court state or suggest that states have the authority to regulate the interstate transportation of natural gas by an interstate pipeline directly to an end-user.

Further, SIGECO erroneously characterizes the Tracy footnote in which the Court states that it "expresses no view" on the correctness of the decisions by several U.S. Courts of Appeals upholding the Commission's NGA jurisdiction to regulate the transportation of gas by an interstate pipeline directly to an end-user.[34] The Court's statement in the footnote

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32. Tracy, 117 S.Ct, citing Panhandle v. Indiana, 332 U.S. 507 (1947), and Panhandle v. Michigan, 341 U.S. 329 (1951).

33. 117 S.Ct. at 820-21.

34. Id. at 827, n.14.

was not a refusal to endorse the referenced decisions; rather, the Court explicitly disavowed any view on the bypass decisions.

Further, the cited footnote in no way challenges or undermines the integrity of the appellate decisions (two of which the Court refused to consider upon petitions for certiorari)[35] that confirm the Commission's preemptive certificate authority over transportation facilities. Rather, the Court's denial of certiorari suggests that the Court found that those cases either did not decide an important question of federal law that needed to be settled by the Court or did not decide an important federal question in a way that conflicts with relevant decisions of the Court.[36]

Finally, the Commission has rejected claims similar to SIGECO's contending that Indiana certification was needed for an interstate transportation project. In Panhandle Eastern Pipe Line Company, the Commission stated "[c]oncerning the need for state certificate authorization, it is clear that Panhandle's proposal involves the transportation of natural gas in interstate commerce over which the Commission has exclusive jurisdiction. Thus, Indiana has no jurisdiction in

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35. See Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117 (D.C. Cir. 1989), cert. denied, 494 U.S. 1079 (1990); Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 689 F.Supp. 729 (W.D. Mich. 1988, aff'd 887 F.2d 1295 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990).

36. See Rule 10 of the Rules of the Supreme Court of the United States.

this matter and a state certificate is not required."[37] We affirm that decision here.

For all the reasons discussed above, we find that the Commission has exclusive jurisdiction over Midwestern's proposal and that Midwestern is not required to obtain a certificate from the IURC to construct and operate the facilities or to provide transportation service to GPC through those facilities.

B. Bypass Arguments

SIGECO states that GPC's new plant is located within SIGECO's franchise area and is less than one-half mile from its existing natural gas distribution system. Thus, SIGECO argues, Midwestern's proposal is an uneconomic and unreasonable bypass of SIGECO's system with potentially severe impacts on it and its existing customers. Further, SIGECO contends, to the extent that it is unable to serve large industrial customers located within its service territory because an interstate pipeline decides to provide direct distribution service to an end-user, the fixed costs of SIGECO's distribution system will be spread among a progressively smaller customer base. SIGECO argues that this puts upward pressure on its rates which harms customers, limits growth, and erodes its competitive position.

The Commission has held that pipeline service to new customers who are not currently receiving gas service from

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37. Panhandle Eastern Pipe Line Co., 64 FERC P 61,211, at p. 61,612 (1993).

a protesting LDC does not constitute a bypass of the LDC.[38] Thus, the service to GPC proposed by Midwestern does not constitute a bypass of SIGECO since SIGECO is not currently providing such service to GPC. Rather, SIGECO's protest is based on the assumption that it will lose the opportunity to capture GPC's business for itself if the Commission grants Midwestern's request for a certificate. As the Commission has stated, lost opportunity is not the same as cost shifting. There are at present no LDC costs being recouped through this potential market. Since this is a new plant, SIGECO cannot claim reduced revenues or load, and neither the duplicative facilities nor cost-shifting arguments are relevant. Further, GPC will pay for the new Midwestern facilities; accordingly, no costs will be shifted to existing Midwestern shippers. What SIGECO really objects to is competition from interstate pipelines. We have consistently held, however, that the public interest is served by fostering such competition.[39]

There is no merit to SIGECO's claim that Midwestern's proposal would result in wasteful duplication of facilities. Neither SIGECO nor Midwestern has ever served GPC, and neither has existing facilities connected to GPC's new plant to do so. Further, GPC has agreed to reimburse Midwestern for the facilities' costs. Since GPC has requested service from Midwestern rather than SIGECO, only Midwestern will construct facilities and thus there will be no duplication of facilities as alleged by SIGECO.

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38. Texas Eastern Transmission Corp., 71 FERC P 61,020, at p. 61,088 (1995); Mojave Pipeline Co., 69 FERC P 61,244, at p. 61,921 (1994).

39. 50 FERC P 61,069, at p. 61,149 (1990).

SIGECO also argues that Indiana state law prohibits wasteful duplicative utility facilities and services.[40] We have found that Midwestern's proposal falls within the Commission's exclusive jurisdiction. Thus, the cited Indiana law has no bearing on Midwestern's proposal.

SIGECO contends that GPC summarily rebuffed SIGECO's attempts to negotiate an agreement for utility services to GPC's new plant despite SIGECO's allegedly superior proposal. SIGECO states that it cannot determine from Midwestern's application whether Midwestern is the lowest cost provider. Further, SIGECO submits, Midwestern did not explain GPC's unwillingness to consider SIGECO's service as an alternative to Midwestern's. Thus, SIGECO submits, there is no evidence to support a finding that Midwestern's proposal represents the lowest-cost alternative or that there was a fair competitive process for GPC's business.

Midwestern denies that it has engaged in any anticompetitive or unduly discriminatory behavior. GPC states that, contrary to SIGECO's contentions, SIGECO's representatives met with and provided service proposals to GPC. GPC states that it considered a number of suppliers and service providers for natural gas service to its new plant, including SIGECO, Midwestern, and other interstate pipelines. After its review of the various available service options and providers, GPC determined that receiving natural gas through a direct connection to Midwestern, an open access interstate transportation provider, would be the most cost-effective and otherwise appropriate option. According

40. Citing Indiana Code Section 8-1-2-86.

to GPC, it gave fair consideration to SIGECO's proposal but simply did not determine that proposal to be its preferred alternative. GPC maintains that its ability to obtain open access transportation directly from Midwestern and the resulting natural gas cost efficiencies, were crucial factors in its decision to construct a new facility, to locate it in southern Indiana, and in the potential success of the new plant.

The Commission's current policy is to allow competition between local distribution companies and interstate pipelines where there is no indication that the end-user's choice of the pipeline's proposed service was the result of the pipeline's anti-competitive or unduly discriminatory behavior. This policy is based upon a belief that on a national level, natural gas consumers are better served by a competitive natural gas market which encourages improved services at lower costs.[41]

We note that GPC approached Midwestern and requested Midwestern to establish a delivery point to provide transportation service to GPC. Under current Commission policy, we strive to honor the decision by an end-user on whether it is economic to undertake direct service from a pipeline supplier.[42] This policy allows all participants in the natural gas market greater access to the market. The Commission has stated that it is not willing to shield

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41. See, e.g., ANR Pipeline Company, 71 FERC P 61,289 (1995); Paiute Pipeline Company, 68 FERC P 61,199 (1994); Northern Natural Gas Company, 46 FERC P 61,270 (1989).

42. See Peoples Natural Gas Company, 59 FERC P 61,121, at p. 61,475 (1992).

local distribution companies from the effects of competitive forces, because it believes that in the final analysis, all consumers will benefit from the Commission's pro-competitive policies.[43]

GPC made its choice to solicit the services of Midwestern based upon what it perceived its best interests to be. GPC has merely exercised its right to seek competitive sourcing for gas services. It is difficult to attribute this to unfair competition on Midwestern's part. Further, Midwestern is required to honor valid requests for open access service on a nondiscriminatory basis. Midwestern's award of capacity to GPC was effectuated in full compliance with the terms of Midwestern's tariff. Under these circumstances, we find that Midwestern has not engaged in anticompetitive or unduly discriminatory behavior.

SIGECO and NIPSCO are concerned that Midwestern's proposal to construct a pipeline with 30,000 Dth/d of capacity in excess of GPC's current needs means that Midwestern may be seeking to create its own Indiana local distribution system. SIGECO submits that Midwestern must make a subsequent prior notice filing if it intends to use the proposed pipeline facilities to serve additional customers.

Although we agree that Midwestern must make subsequent prior notice filings if it intends to connect additional customers to the proposed lateral pipeline, we

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43. ANR Pipeline Company, 71 FERC P 61,289 (1995); Paiute Pipeline Co., 68 FERC P 61,064, order deferring consideration, 69 FERC P 61,247 (1995), order on reh'g, 70 FERC P 61,227 (1995); NorthwestPipeline Corp., 54 FERC P 61,191, at p. 61,574 (1991).

disagree that Midwestern may be seeking to create a local distribution system by constructing excess capacity. Midwestern states that GPC requested it to install a pipeline capable of accommodating a transportation quantity of approximately 40,000 Dth/d, i.e., an 8-inch line, in anticipation of GPC's planned expansions of the plant. Further, sizing the line to accommodate future expansions will prevent future environmental disturbances and avoid further inconvenience to landowners. Furthermore, no costs will be shifted to existing customers as a result of construction of an 8-inch diameter lateral because GPC is fully reimbursing Midwestern for the cost of the facilities. Under these circumstances, we have no reason to object to the excess capacity Midwestern proposes to construct.

C. Request for Hearing

SIGECO requests an evidentiary hearing to address alleged disputed issues of fact including the extent of any duplication of facilities; whether GPC considered SIGECO's, or anyone's, competing proposal; whether Midwestern's agreement with GPC represents the lowest-cost alternative for GPC; a comparison of Midwestern's and SIGECO's proposals to serve GPC in terms of the construction costs, the capital and related operating expenses, the rates, terms, and conditions, and the environmental impacts. SIGECO argues that the Commission should at least require the parties to submit the underlying service agreements between Midwestern and GPC to determine whether the competitive process was fair.

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The requirement for a trial-type evidentiary hearing applies only to disputed issues of material fact that cannot be resolved on the basis of the written record.[44] We believe that the parties had an adequate opportunity to present their views and the Commission had an adequate record upon which to base its decision. For the reasons discussed above, we find that SIGECO's protest does not raise any issues of anti-competitive or unduly discriminatory behavior on the part of Midwestern and that there are no material facts in dispute in this proceeding requiring a hearing. Rather, the evidence shows that Midwestern's proposal will provide GPC with options it desires to better serve its interests. For all the reasons provided above, we find Midwestern's proposal is required by the public convenience and necessity.

As noted above, because of the protest to Midwestern's prior notice filing, the Commission treated the filing as an application for specific Section 7(c) authorization. It is the Commission's policy not to grant Section 7(c) case-specific authority to construct and operate facilities when the applicant can do so under its blanket certificate.[45] The Commission, therefore, will authorize Midwestern to construct and operate the subject facilities under its Part 157 blanket certificate authorization.

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44. See, e.g., Amador State Lines, Inc. v. U.S., 685 F.2d 333 (9th Cir. 1892); Boston Carrier, Inc. v. ICC, 728 F.2d 1508 at 1511 n.5 (D.C. Cir. 1984).

45. See Gas Transport, Inc., 50 FERC P 62,013 (1990); Tennessee Gas Pipeline Co., 55 FERC P 61,437 (1991).

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IV. Environmental Analysis

On October 9, 1998, after reviewing Midwestern's prior notice application and the environmental comments by SIGECO in this docket, the Commission's staff issued a Notice of Intent to Prepare an Environmental Assessment For The Proposed GPC Sales Tap Project and Request For Comments on Environmental Issues (NOI). Five parties responded with comments regarding the NOI: SIGECO, the U.S. Fish and Wildlife Service (FWS), the Federal Aviation Administration, GPC, and Midwestern. These comments are addressed in the Environmental Assessment (EA) prepared by the Commission's staff. The EA recommends several mitigation measures, which we adopt and upon which this order's authorization is conditioned.

As discussed, Midwestern's proposed facilities will be used to provide gas service to a corn processing plant under construction by GPC. Because the GPC plant is a nonjurisdictional facility and already under construction, the EA does not consider GPC's plant.

The FWS states that the bottomland forest present in Midwestern's project area includes valuable habitat for wildlife, including, potentially, the federally listed Indiana bat and the bald eagle. The FWS states that the bald eagle is not likely to occur in the project area and is therefore not of concern. Further, based on mist-net surveys conducted by Midwestern as requested by the FWS, no Indiana bats are present. Thus, the FWS has concluded, and the EA concurs, that the proposed project would not adversely affect any federally endangered or threatened species.

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Midwestern has agreed to compensatory mitigation ratios for restoration of trees within forested habitat of present wildlife. However, long-term impact on present wildlife nevertheless would be associated with the removal of the trees; therefore, avoidance of tree clearing is preferable, where possible. The Commission's staff has determined that Midwestern could avoid clearing one acre of bottomland hardwood forest by relocating the exit point for its directional drill. Therefore, to minimize the long term effects of the proposed project, the EA recommends that Midwestern relocate the exit point for the directional drill of the West Fork White River east of milepost (MP) 1.54 to avoid the bottomland hardwood forest. In addition, the EA recommends that Midwestern not clear any trees between the east bank of the river and the exit point for the directional drill.

The EA also analyzes the alternative plan submitted by Midwestern to open-cut the West Fork White River in the event directionally drilling fails. The EA finds that the alternative plan is generally acceptable and would approve the additional work space required should Midwestern have to open cut. However, if Midwestern does has to cross the West Fork White River using the open-cut technique, the EA recommends that Midwestern:

a. limit the width of the construction right-of-way, not including extra work spaces, to 50 feet through the riparian area along the east side of the river;

b. replant trees within the temporary portion of the construction right-of-way between MPs 1.45 and 1.49 according to the ratios suggested for this project by the IDNR; and

c. monitor the success of tree planting in accordance with Midwestern's Floodway Forest Mitigation Plan.

In its comments on the NOI, SIGECO raised the concern that "the Army Corps of Engineers may have improperly authorized this activity [the proposed project] under a nationwide permit." However, the U.S. Army Corps of Engineers (COE) has subsequently confirmed that Nationwide 12 permit, issued by COE to Midwestern on April 3, 1998, is appropriate for all proposed project activities, including the crossing of Patrick Ditch, the horizontal directional drilling of West Fork White River, and the alternate open-cut method of crossing the West Fork White River.

Midwestern proposes to use 100-foot-wide construction right-of-way for its pipeline, of which about half will be permanent right-of-way and half temporary construction right-of-way. Midwestern has stated that the construction work area would be reduced to the 50-foot-wide permanent right-of-way corridor through wetland areas. Extra work spaces would total about 8.4 acres. Of this 8.4 acres, 0.11 acre would be located in the riparian, bottomland hardwood forest.

In reducing the proposed 100-foot-wide construction right-of-way width to 50 feet in wetland areas, the Commission's staff has concluded that 100 feet is wider than necessary to install an 8-inch-diameter pipeline in other portions of the route. Therefore, to minimize impact on the bottomland hardwoods and upland forests, the EA recommends that Midwestern also limit the width of the construction right-of-way through all forested areas to 50 feet.

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In its comment on the NOI, SIGECO stated that "it appears that Midwestern and the state expedited the historic preservation and archeological review process to such an extent that meaningful review was not done" and that the review "may have overlooked cultural resources." We disagree. Midwestern contacted the Indiana State Historic Preservation Office (SHPO) regarding the need for a cultural resources survey of the proposed project area. In a letter dated February 13, 1998, the SHPO indicated that most of the pipeline alignment east of the West Fork White River had been previously evaluated, and that based on the results of a previous investigation, only that portion of the project west of the river would require a survey.

Midwestern completed a cultural resources survey (west of the West Fork White River) which covered a 150-foot-wide corridor, extra work spaces and pipeyards. Two prehistoric sites and two historic sites were identified as a result of the survey. None of these sites were recommended as eligible for the National Register of Historic Places (NRHP). No evidence of any previously recorded sites was identified. Subsequently, Midwestern contacted the SHPO (letter dated March 26, 1998) identifying additional access roads, a pipeyard, and access/ turning areas on the east side of the river. In a letter dated April 24, 1998, addressing both these additional areas and the cultural resources survey report, the SHPO indicated that "the proposed improvements to eastern access roads should have no effect on significant archaeological resources, as long as all construction is limited to previously disturbed areas" and that no further investigation of the eastern pipeyard was warranted. The SHPO also concurred that the four

archaeological sites were not likely to yield significant information, and no further investigation of the sites appeared to be warranted.[46]

In further comments, SIGECO provided a brief records and literature review of the "vicinity of Maysville" to evidence that the area has a high potential for historic and prehistoric resources. This potential already been identified by the SHPO and was the basis for the SHPO's conducting a survey of the previously unsurveyed portions of the proposed project. The survey report includes a literature review and records search of the area within a three-mile radius of the proposed project. The documented historical and archaeological importance of the area notwithstanding, the on-the-ground survey identified no NRHP-eligible cultural resources. The Commission's staff has reviewed and concurs in the results of the SHPO's cultural resources survey report. Thus, we find SIGECO's concerns unfounded and its allegations unsubstantiated.

The no-action alternative would preclude Midwestern from providing the proposed service to GPC. GPC would then be forced to make alternative arrangements for natural gas or to use other energy sources, such as fuel oil or coal. Therefore, while denial of Midwestern's application would avoid the environmental impact identified in the EA, the use

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46. The surveying and testing of the portion of the project east of the West Fork White River is documented in a report meeting the Secretary of the Interior's Standards and Guidelines for the currently proposed project. The report has been reviewed by the SHPO and the Commission's staff in accordance with Section 106 of the National Historic Preservation Act.

of fuels other than natural gas could result in more diverse impacts, particularly on air quality.

The no-action alternative also would cause a delay in Midwestern's ability to provide gas service would affect GPC's plans to test its plant equipment, currently under construction, in April 1999.

Aside from the no-action alternative, SIGECO stated that it could provide natural gas service to GPC with fewer facilities and less environmental impact than Midwestern's proposal. SIGECO's franchise area. However, it is not clear whether SIGECO could construct the necessary facilities in the time frame required by GPC. Further, it is not known whether SIGECO's facilities could provide GPC with the same levels of service proposed by Midwestern (i.e., up to 10,000 dekatherms of gas per day for plant start-up, with expansion up to 40,000 dekatherms per day). Moreover, as discussed above, GPC states that it considered and rejected SIGECO as a gas supplier. GPC further stated that its ability to obtain open access transportation directly from Midwestern and the resulting natural gas cost efficiencies were crucial factors in its decision to construct the plant.

Therefore, while the EA concludes that SIGECO's alternative may be environmentally preferable to Midwestern's proposal based solely on environmental grounds, it is not likely that SIGECO could meet the time frames required by GPC. Further, the Commission's policy of promoting competition, as discussed above, makes SIGECO's proposed alternative less desirable.

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With adoption of the above-discussed recommendations and implementation of the mitigation measures set forth in the appendix to this order, the EA concludes that Midwestern's project would not constitute a major Federal action significantly affecting the quality of the human environment.

V. Conclusion

At the hearing held on December 16, 1998, the Commission on its own motion received and made a part of the record in this proceeding, all evidence, including the applications and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record,

The Commission orders:

(A) Midwestern is authorized to construct and operate the proposed facilities under its Part 157 blanket certificate, all as more fully set forth in this order, subject to the conditions set forth herein and in the appendix to this order.

(B) SIGECO's and NIPSCO's protests, and SIGECO's request for a hearing, are denied.

(C) Midwestern shall notify the Commission's environmental staff by telephone and/or facsimile of any environmental noncompliance identified by other Federal, state, or local agencies on the same day that such agency notifies Midwestern. Midwestern shall file a written confirmation of such notification with the Secretary of the Commission within 24 hours.

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Environmental Mitigation Conditions

1. Midwestern shall follow the construction procedures and mitigation measures described in its application and identified in the environmental assessment (EA), unless modified by this Order. Midwestern must:

a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);

b. justify each modification relative to site-specific conditions;

c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and

d. receive approval in writing from the Director of the Office of Pipeline Regulation (OPR) before using that modification.

2. The Director of OPR has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:

a. the modification of conditions of this Order; and

b. the design and implementation of any additional measures deemed necessary (including stop work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.

3. Prior to any construction, Midwestern shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors, and contractor personnel will be informed of the environmental inspector's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs before becoming involved with construction and restoration activities.

4. Midwestern shall relocate the exit point for the directional drill of the West Fork White River east of milepost (MP) 1.54 to avoid the bottomland hardwood forest. In addition, Midwestern shall not clear any trees between the east bank of the river and the exit point for the directional drill.

5. If Midwestern has to cross the West Fork White River using the open-cut technique Midwestern shall:

a. limit the width of the construction right-of-way, not including extra work spaces, to 50 feet through the riparian area along the east side of the river;

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b. replant trees within the temporary portion of the construction right-of-way between MPs 1.45 and 1.49 according to ratios suggested for this project by the Indiana Department of Natural Resources;

c. monitor the success of tree planting in accordance with Midwestern's Floodway Forest Mitigation Plan.

6. Midwestern shall limit the width of the construction right-of-way through all forested areas to 50 feet.

Federal Energy Regulatory Commission

85 FERC P 61,358, 1998 WL 878038 (F.E.R.C.)

APPENDIX C — ORDER ON MOTION TO DISMISS OF THE STATE OF INDIANA, INDIANA UTILITY REGULATORY COMMISSION DATED JANUARY 27, 1999

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

CAUSE NO. 41197

IN THE MATTER OF THE PETITION BY SOUTHERN INDIANA GAS AND ELECTRIC COMPANY FOR THE INDIANA UTILITY REGULATORY COMMISSION TO ORDER MIDWESTERN GAS TRANSMISSION COMPANY TO CEASE AND DESIST FROM ENGAGING IN THE RENDERING OF GAS DISTRIBUTION SERVICE IN RURAL AREAS OF INDIANA, INCLUDING THE TRANSPORTATION OF GAS FROM OUTSIDE INDIANA FOR DIRECT SALE OR DELIVERY TO CONSUMERS WITHIN THE STATE OF INDIANA

RESPONDENT: MIDWESTERN GAS TRANSMISSION COMPANY

ORDER ON MOTION TO DISMISS

APPROVED: JANUARY 27, 1999

BY THE COMMISSION:
Camie Swanson-Hull, Commissioner
Scott R. Jones, Assistant Chief Administrative Law Judge

Appendix C

On June 11, 1998, Southern Indiana Gas and Electric Company ("Petitioner" or "SIGECO") filed its Complaint in the above-captioned matter against Midwestern Gas Transmission Company ("Respondent" or "Midwestern"). On June 18, 1998, Indiana Gas Company, Inc. filed its "Petition to Intervene of Indiana Gas Company, Inc." which appears in the following words and figures, to-wit:

(H.I.)

On June 23, 1998, Respondent filed its "Motion for Extension of Time" which appears in the following words and figures, to-wit:

(H.I.)

Said Motion was granted by docket entry dated July 16, 1998. On June 26, 1998, Northern Indiana Public Service Company filed its "Petition of Northern Indiana Public Service Company to Intervene" which appears in the following words and figures, to-wit:

(H.I.)

On July 20, 1998, Respondent filed its "Motion to Dismiss Petition, Or Alternatively for Stay and Certification to the Court of Appeals" which appears in the following words and figures, to-wit:

(H.I.)

Also on July 20, 1998, Respondent filed its "Memorandum in Support of Motion to Dismiss Petition, or Alternatively

for Stay and Certification to the Court of Appeals" which appears in the following words and figures, to-wit:

(H.I.)

On July 27, 1998, the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Gas and Coke Utility ("Citizens Gas") filed its "Petition to Intervene of Citizens Gas and Coke Utility" which appears in the following words and figures, to-wit:

(H.I.)

On August 18, 1998, the Petitioner filed its "Response of Southern Indiana Gas and Electric Company to Motion of Midwestern Gas Transmission Company to Dismiss Petition, or Alternatively, for a Stay and Certification to the Court of Appeals" which appears in the following words and figures, to-wit:

(H.I.)

On August 25, 1998, Indiana Gas Company, Inc. and Citizens Gas and Coke Utility filed their "Joint Response of Intervenors Indiana Gas Company, Inc., Citizens Gas and Coke Utility and Northern Indiana Public Service Company in Opposition to Midwestern Gas Transmission Company's Motion to Dismiss" which appears in the following words and figures, to-wit:

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(H.I.)

On September 2, 1998, Respondent filed its "Motion for Leave to File a Reply" which appears in the following words and figures, to-wit:

(H.I.)

Also on September 2, 1998, Respondent filed its "Reply of Midwestern Gas Transmission Company to Response of Southern Indiana Gas and Electric Company" which appears in the following words and figures, to-wit:

(H.I.)

On September 8, 1998, Community Natural Gas Company, Inc. filed its "Community Natural Gas Company, Inc.'s Petition to Intervene" which appears in the following words and figures, to-wit:

(H.I.)

On September 23, 1998, Grain Processing Corporation filed its "Verified Petition of Grain Processing Corporation to Intervene" which appears in the following words and figures, to-wit:

(H.I.)

Also on September 23, 1998, Grain Processing Corporation filed its "Statement in Support of Midwestern Gas Transmission Company" which appears in the following words and figures, to-wit:

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(H.I.)

On September 28, 1998, the Petitioner filed its "Motion of Southern Gas and Electric Company for Leave to File its Response to the Reply of Midwestern Gas Transmission Company and Grain Processing Corporation's Statement in Support of Midwestern" which appears in the following words and figures, to-wit:

(H.I.)

Also on September 28, 1998, the Petitioner filed its "Response of Southern Indiana Gas and Electric Company to the Reply of Midwestern Gas Transmission Company and Statement in Support of Grain Processing Corporation" which appears in the following words and figures, to-wit:

(H.I.)

On October 14, 1998, Community Natural Gas Company, Inc. filed its "Community Natural Gas Company, Inc.'s Statement in Support of Southern Indiana Gas and Electric Company, Indiana Gas Company, Inc., Citizens Gas and Coke Utility, and Northern Indiana Public Service Company" which appears in the following words and figures, to-wit:

(H.I.)

On December 22, 1998, Midwestern filed its "Midwestern Gas Transmission Company's Second Motion to Dismiss Based on FERC Decision" which appears in the following words and figures, to-wit:

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(H.I.)

On December 30, 1998, Grain Processing Corporation filed its "Request of Grain Processing Corporation for Ruling on Motion to Dismiss" which appears in the following words and figures, to-wit:

(H.I.)

On January 14, 1999, Petitioner filed its "Response of Southern Indiana Gas & Electric Co. to Midwestern Transmission's Second Motion to Dismiss Based on FERC Decision in Request of Grain Processing Corporation for a ruling on that Motion" which appears in the following words and figures, to-wit:

(H.I.)

On January 14, 1999, certain of the Intervenors filed their "Intervenors Indiana Gas Company, Inc., Citizens Gas & Coke Utility and Northern Indiana Public Service Company in Opposition to Midwestern Gas Transmission Company's Second Motion to Dismiss Based on FERC Decision and a Request of Grain Processing Corporation for a Ruling on Motion to Dismiss" which appears in the following words and figures, to-wit:

(H.I.)

The Commission based upon the above-described filings and the applicable law, now finds as follows:

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1. **Pending Motions and Petitions.** The Commission finds that the Respondent's Motion for Leave to File a Reply filed on September 2, 1998 should be granted. The Motion of Petitioner filed on September 28, 1998 for Leave to File its Response to the Reply of Midwestern Gas Transmission Company and Grain Processing Corporation's Statement in Support of Midwestern should also be granted.

The petitions to Intervene of Indiana Gas Company, Inc., Northern Indiana Public Service Company, Citizens Gas, Community Natural Gas Company, Inc., and Grain Processing Corporation should all be granted. The Respondent's request to take administrative notice of the Federal Energy Regulatory Commission's decision issued December 16, 1998 in Docket No. CP98-S38-000 should be granted.

2. **Background.** The Petitioner is a corporation, organized and existing under the laws of the State of Indiana and is engaged as a public utility in the rendering of gas utility service to the public in Indiana, including Daviess County. The Respondent is a natural gas company under the federal Natural Gas Act ("NGA") engaged in the transportation of natural gas in interstate commerce and in the construction of facilities for the transportation of gas. The Intervenor Grain Processing Corporation ("GPC") is a manufacturer and marketer of various corn-based products and is constructing a new corn processing plant in Daviess County, Indiana, which it intends to make fully operational during the summer of 1999.

According to the facts agreed upon by the parties, GPC requested service from the Respondent who filed a prior noticed request with the Federal Energy Regulatory Commission.

The service which the Respondent would provide GPC would be the interstate transportation of gas which GPC would purchase itself outside of the State of Indiana. The FERC docketed the Respondent's request as Docket No. CP98-538-000 on May 12, 1998. The Respondent's request before the FERC was for authorization to construct and operate a delivery tap, a delivery lateral, and a meter station, which facilities would be used to transport and deliver gas to a new customer, GPC, as an industrial end-user. In addition to the Complaint that the Petitioner filed initiating this proceeding, Petitioner, SIGECO, filed with the FERC a request for an evidentiary hearing within the 45-day notice period provided by the prior notice procedures of that federal agency. Additionally, NIPSCO and SIGECO filed protests to Midwestern's proposal before the FERC.

3. **SIGECO's Petition.** The thrust of SIGECO's Petition before this Commission is that the Respondent threatens to render gas distribution service in rural areas of Indiana without having obtained from the Commission a necessity certificate authorizing it to do so. The Petition states that the rendering of gas distribution service by the Respondent without such a certificate would be unlawful, unreasonable, and in violation of I.C. 8-1-2-87 (b). Further, the Petition states that I.C. 8-1-2-87.5 requires that any entity "engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within the state" must have a necessity certificate from the Commission to do so. (Petition at page 2) The Petition requests that the Commission investigate this matter and find the Respondent to be in violation of I.C. 8-1-2-87 (b) and/or I.C. 8-1-2-87.5 and order the Respondent to cease

and desist the rendering of gas distribution service in rural areas of the State of Indiana, including the transportation of gas from outside Indiana for direct sale or delivery to any consumer within the State.

4. **Respondent's Motion to Dismiss.** In its Motion to Dismiss, the Respondent Midwestern argues that the transportation of natural gas for GPC in interstate commerce by Midwestern is subject to the exclusive jurisdiction of the FERC under the NGA. 15 U.S.C. Section 717 (b). The Respondent also asserts that because it will be serving a customer and facility new to the service area, no issues of by-pass are present. Thus, any action by this Commission to assert authority over Midwestern's transportation service to GPC for gas which GPC purchases outside Indiana is preempted by the NGA. In support of its arguments, the Respondent cites five decisions from federal courts of appeals that have upheld the FERC's exclusive jurisdiction to regulate the interstate transportation of natural gas, including the interstate transportation of natural gas directly to end users, and rejecting state attempts to regulate such transactions. *See Cascade Natural Gas Corp., supra,* (10th Cir.) 955 F.2d at 1412-1419; *Public Utilities Comm. of California, supra,* (D.C. Cir.) 900 F.2d at 274-276; *National Fuel Gas Supply Corp. v. Public Service Commission of N.Y.*, 894 F.2d 571, 579 (2nd Cir.), cert. Denied, 110 S.Ct. 3240 (1990); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipeline Co.*, 689 F.Supp, 729, 732-738 (W.D. Mich. 1988), affd., 887 F.2d 1295, 1300-1301 (6th Cir. 1989), cert. Denied, 110 S.Ct. 1806 (1990) (Related case at *Michigan Consolidated Gas Co. v. F.E.R.C.*, 883 F.2d 117, 121-122 (D.C. Cir. 1989), *cert. Denied*, 110 S.Ct. 1807 (1990)); *Public Service Comm. of W. Va. V. F.P.C.*, 437 F.2d 1234, 1283-1239 (4th Cir. 1971).

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In its Memorandum in support of its Motion to Dismiss, the Respondent states that the FERC has addressed the nature of its jurisdiction over interstate facilities in Indiana, in circumstances similar to those in the instant Petition. In *Panhandle Eastern Pipeline Co.*, Docket No. CP93-116-000, August 5, 1993, 64 FERC P61, 211, the interstate pipeline requested authorization under 18 C.F.R. §§157.205 and 157.212 to construct facilities to provide firm transportation service to a customer of a local distribution company. Both the Office of the Utility Consumer Counselor and the LDC filed Motions to Intervene and protested Midwestern's Application before the FERC. The LDC argued that the pipeline transportation service would result in a wasteful duplication of facilities and cost shifting among the LDC's customers. The LDC also contended that the customer might be a public utility subject to the IURC's jurisdiction under I.C. 8-1-2-87.5. Another Intervenor before the FERC in the Panhandle Eastern proceeding argued that the interstate pipeline proposal should also be approved by the IURC, as well as by the FERC. The FERC concluded that "it is clear that Panhandle's proposal involves the transportation of natural gas in interstate commerce over which the Commission (FERC) has exclusive jurisdiction" (citation omitted). Thus, Midwestern argues in the instant cause, Indiana has no jurisdiction in this matter and a state certificate is not required. Alternatively, the Respondent argues that this Commission should stay any further proceedings until the FERC has issued its decision and order in Docket No. CP98-538-000 and should certify the purely legal question raised to the Indiana Court of Appeals for decision and determination, pursuant to I.C. 8-1-3-10.

5. **Responsive Arguments.** SIGECO and the similarly interested Intervenors supporting SIGECO's position replied to Midwestern's arguments with the position that the five federal circuit court decisions did not sufficiently support Midwestern's position that interstate transportation is the same as local distribution of gas. They also argue that, because the federal decisions cited by the Respondents are from circuits other than the Seventh Circuit they are not controlling authority for the purpose of adjudicating SIGECO's instant petition. Further, they argue that local distribution occurs when gas is supplied to an end user and that state certification is required for that service even when the gas was purchased outside of the state of delivery. To the extent a conflict exists between federal and state statutes, SIGECO and the Intervenors argue that the Commission is bound to support and enforce the Indiana statutes leaving questions of constitutional law to other forums. SIGECO and the similarly interested Intervenors are also opposed to the certification of the legal question to the Indiana Court of Appeals, arguing that the matter would most conveniently be resolved by the IURC.

6. **Respondent's Second Motion to Dismiss.** On December 22, 1998, Midwestern renewed its Motion to Dismiss based upon a FERC decision issued in Docket No. CP98-538-000 on December 16, 1998 authorizing Midwestern to construct and operate facilities to transport natural gas for GPC. The Second Motion to Dismiss also requested that the Commission take administrative notice of the FERC's decision, which is appended to the Motion and which we have previously found should be granted. In its December 16, 1998 Order, the FERC held that it has exclusive

jurisdiction over Midwestern's proposed service to GPC, and that the service constitutes interstate transmission of natural gas, and not local distribution. (FERC Order at pages 5-8) The FERC also held that the proposed service to GPC involves no interstate retail sale which may be regulated by the states, rather that the proposed pipeline will be used solely for transportation of gas in interstate commerce.

In its Second Motion, Midwestern argues that the FERC decision collaterally estops subsequent litigation over the issue because (1) the issues sought to be estopped are within the statutory jurisdiction of the FERC; (2) the FERC was acting in a judicial capacity; (3) the parties to that proceeding, and to the proceeding before the IURC have had a fair opportunity to litigate the issues before the FERC; and (4) the FERC decision is subject to judicial review. See *U.S. v. Utah Construction and Mining Co.*, 86 S.Court 1545, 1560 (1966); *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 394 (Ind. 1988). In its Second Motion, Midwestern also argues that if the IURC is not inclined to dismiss SIGECO's Petition, any proceedings in this Cause should be stayed pending the outcome of any rehearing before the FERC and/or judicial review before the United States Court of Appeals as described by Section 19 (a) and (b) of the Natural Gas Act. 15 U.S.C. Sec. 717 (r) (a) and (b). In light of the FERC Order and the exclusivity of judicial review under Section 19 of the Natural Gas Act, Midwestern withdrew its prior alternative request for certification of the legal issue by the Commission to the Indiana Court of Appeals.

7. Responses to Second Motion to Dismiss. Petitioner and certain of the similarly interested Intervenors respond to the Second Motion to Dismiss with two basic arguments. First, that whatever the FERC's Order says, the responsibility of this Commission is to enforce the Indiana statutes, and that even though the FERC Order contains a determination that it preempts the Indiana statutes, the Commission's statutory duty is to enforce, not invalidate, Indiana law. See *General Motors Corp. v. Indianapolis Power & Light Co.*, 654 N.E.2d 752, 763 (Ind.Ct. of Appeal 1995), *Sunshine Promotions Inc. v. Ridlen*, 483 N.E.2d 761, 765 (Ind.Ct. of Appeal 1985), *State ex rel. Bash v. Medical Licensing Board of Indiana*, 451 N.E.2d 691, 696 (Ind.Ct. of Appeal 1983), *Consolidated Rail Corp. v. Smith*, 664 F.Supp. 1228, 1223 (N.D.Ind. 1987). Second, SIGECO and the similarly interested Intervenors argue that the FERC Order does not collaterally estop litigation of any question before this Commission in this proceeding. In that connection, they argue that the FERC had no statutory authority to declare Indiana Code Sections 8-1-2-87 and 87.5 invalid, and thus, the issues which the Respondent seeks to estop this Commission from considering were not within the statutory jurisdiction of the FERC. SIGECO and the similarly interested Intervenors also argue that the FERC, in entering its Order, was not acting in its judicial capacity, but rather as an interested party advocating its own position. Thus, they conclude that they did not have a fair opportunity to litigate the preemption issue before the FERC. Additionally, the responsive parties argue that under Indiana law, collateral estoppel only applies where particular issues are adjudicated in one forum and are then put at issue in a subsequent suit on a different cause of action between the same parties or their privies. See *McClanahan*

v. Remington Freight Lines, Inc., 517 N.E.2d 390, 394 (Ind. 1998). The argument follows that since the instant proceeding was initiated prior to the issuance of the FERC decision collateral estoppel would not apply.

8. **Findings.** The facts in this case, for purposes of resolving the Respondent's motion to Dismiss, are not in dispute, and therefore, a hearing is not necessary prior to this Commission's rendering of findings thereon. The Petitioner is a public utility rendering the provision of gas utility service to the public in the State of Indiana including Daviess County, Indiana. Intervenor GPC is a manufacturer and marketer of various corn-based products and is constructing a new corn processing plant in Daviess County, Indiana. GPC has requested the services of the Respondent for the purposes of transportation, in interstate commerce, of natural gas which GPC intends to purchase outside of the State of Indiana and have delivered to its facility in Daviess County, Indiana. The Petitioner argues that such transportation of natural gas, even if transported in *interstate* commerce to an end-use customer within the State of Indiana, requires certification under Indiana law even if the natural gas is owned by the end-use customer prior to its transportation. The Respondent argues that such transactions fall within the NGA and thus are subject to the exclusive jurisdiction of the FERC. The Respondent has supported this position with decisions from federal circuits which have found that state assertions of jurisdiction for the purpose of requiring certification for the provision of such services are preempted by the federal statutes, and that the FERC's jurisdiction regarding such matters is exclusive. The Respondent has also provided this Commission with a 1993

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FERC decision based upon facts similar to the instant proceeding in which the FERC found that its jurisdiction was exclusive.

The Petitioner and certain of the similarly interested Intervenors have argued that the federal authorities which the Respondent relies upon do not include Seventh Circuit decisions, and thus, this Commission is not bound by them. In assessing the arguments of the parties, we are mindful of the fact that the Seventh Circuit, by which this Commission is bound, has been silent on the issue presented in the instant proceeding. Thus, we may only consider the five federal decisions involving facts similar to those present in this proceeding which the Respondent relies upon as persuasive. The Petitioners and certain of the similarly interested Intervenors have also argued that whether or not the Indiana statute, to the extent it may conflict with the federal statute, is constitutional, unconstitutional, or otherwise preempted, is not a decision for this Commission to make, but rather, the charge to this Commission is simply to enforce the state statutes. This is a strong argument which may not be taken lightly.

The Respondent's Second Motion to Dismiss is based upon a FERC decision issued on December 16, 1998 regarding facts common to the instant proceeding as well as the proceeding before the FERC, and specifically finds that the Indiana law requirement is preempted by the federal law. The Respondent argues in its Second Motion to Dismiss that the Petitioner and the similarly interested Intervenors are collaterally estopped from challenging the preeminence of the federal statutes. The Petitioner and the similarly interested

Intervenors have responded with the argument that the FERC is without authority to make such a ruling and that this Commission does not owe the FERC's decision deference with regard to the FERC's interpretation of federal and state statutes in any event. Further, the Petitioner and the similarly interested Intervenors argue that the FERC decision does not collaterally estop the instant litigation.

We agree with the Petitioner that this Commission is just as entitled to interpret statutes as is the FERC. We further appreciate that our function as a state administrative agency is to enforce the statutes entrusted to it, rather than to find that such statutes are unconstitutional. However, the Respondent has demonstrated that states in other federal circuits have been unsuccessful in attempting to enforce state certification statutes when federal jurisdiction has been asserted exclusively. The FERC has recently removed any doubt as to whether it would assert exclusive jurisdiction over the proposed transactions as between the Intervenor GPC and the Respondent Midwestern and while the FERC is surely within its authority to assert jurisdiction over these transactions, the exclusivity of that jurisdiction is not a question for FERC alone to determine. Thus, the question as to whether the FERC's jurisdiction is preemptive as applied to the Indiana statutes certainly is a federal question currently before a federal authority. On January 15, 1999 SIGECO filed its Request for Rehearing before the FERC.

Based upon all of the above, we find that the Respondent's Second Motion to Dismiss should be denied. While the recent FERC decision makes clear its assertion of exclusive jurisdiction, the FERC is not a reviewing body of

this forum. It does appear that the weight of federal decisions would suggest that the application of the Indiana statutes to the instant petition would not survive a federal challenge. And, advancing to hearing on the instant proceeding while the preemption question remains pending before a federal forum would be contrary to principles of economy and efficiency. Because there is an underlying state interest entrusted to this agency, we will not grant the Respondent's Motion to Dismiss while the issue is pending before federal forums. In fact, were the issue of by-pass present in this proceeding, we would have more receptively considered convening an evidentiary hearing now while the preemption question progresses through federal channels. As we are in effect deferring the federal preemption issue for resolution by federal forums, we need not reach the collateral estoppel argument raised by the parties in this proceeding. For this reason, we conclude that this proceeding should be stayed pending further resolution of the federal question before proper reviewing authorities.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The Petitions to Intervene described herein are hereby granted.

2. The Respondent's Motion for Leave to file a Reply filed on September 2, 1998 is hereby granted; the Motion of Petitioner filed on September 28, 1998 for Leave to File its Response to the Reply of Midwestern Gas Transmission Company and Grain Processing Corporation's Statement in support of Midwestern is hereby also granted.

3. Midwestern Gas Transmission Company's Second Motion to Dismiss based on FERC's decision in Docket No. CP98-S38-000 is hereby denied; however, this proceeding is stayed pending further federal review, reconsideration, or appeal of that decision.

4. This order shall be effective on and after the date of its approval.

MCCARTY, KLEIN, RIPLEY, SWANSON-HULL CONCUR; ZIEGNER DISSENTS:
APPROVED: JANUARY 27, 1999

I hereby certify that the above is a true and correct copy of the Order as approved.

s/ Joseph M. Sutherland
Joseph M. Sutherland, Executive
Secretary to the Commission

Appendix C

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

CAUSE NO. 41197

IN THE MATTER OF THE PETITION BY SOUTHERN INDIANA GAS AND ELECTRIC COMPANY FOR THE INDIANA UTILITY REGULATORY COMMISSION TO ORDER MIDWESTERN GAS TRANSMISSION COMPANY TO CEASE AND DESIST FROM ENGAGING IN THE RENDERING OF GAS DISTRIBUTION SREVICE IN RURAL AREAS OF INDIANA, INCLUDING THE TRANSPORTATION OF GAS FROM OUTSIDE INDIANA FOR DIRECT SALE OR DELIVER TO CONSUMERS WITHIN THE STATE OF INDIANA

RESPONDENT: MIDWESTERN GAS TRANSMISSION COMPANY

DISSENT OF
Commissioner David E. Ziegner

I respectfully dissent from the majority opinion in this Cause. I agree with the majority statements that the Commission's ". . . function as a state administrative agency is to enforce the statutes entrusted to it. . . ." I also agree with the majority that Respondent's Second Motion to Dismiss should be denied. However, I do not believe that a stay is the appropriate action for the Commission since I believe our state statute is still in effect. I would prefer to rule on the merits of the case.

s/ Commissioner David E. Ziegner
Commissioner David E. Ziegner

APPENDIX D — REQUEST OF THE MIDWESTERN GAS TRANSMISSION COMPANY FOR BLANKET AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwestern Gas Transmission Company
Docket No. CP00- -000

REQUEST UNDER BLANKET CERTIFICATE PRIOR NOTICE PROCEDURE

Pursuant to Sections 157.205 and 157.211 of the Regulations of the Federal Energy Regulatory Commission ("Commission") and blanket authority granted in Docket No. CP82-414-000 on September 1, 1982, Midwestern Gas Transmission Company ("Midwestern") hereby provides prior notice that it intends to construct and operate a delivery tap under its blanket authority to facilitate deliveries of natural gas to Scepter, Inc. ("Scepter"), an industrial end-user. In support hereof, Midwestern states as follows:

I.

IDENTITY OF APPLICANT

The exact legal name of Midwestern is Midwestern Gas Transmission. Midwestern is a corporation organized and existing under the laws of the State of Delaware. The location of Midwestern's principal place of business is located at 1001 Louisiana Street, Houston, Texas 77002. The names, titles,

mailing addresses and telephone and facsimile numbers of the persons designated to receive service and to whom communications concerning this application are to be addressed are as follows:

*David E. Maranville,
Counsel
Midwestern Gas Transmission
Company
P.O. Box 2511
Houston, Texas 77252
(713) 420-3525
(713) 420-7025 (Fax)

*Anthony Ivancovich
Andrews & Kurth, L.L.P.
1701 Pennsylvania
Avenue, N.W.
Suite 300
Washington, D.C. 20006
(202) 662-2700

Thomas G. Joyce,
Manager of Certificates
*Veronica Hill, Certificates &
Regulatory Compliance
P. O. Box 2511
Houston, Texas 77252-2511
(713) 420-3555
(713) 420-5608 (Fax)

*Michael D. Moore
Director, Federal Agency
Affairs
El Paso Energy Corporation
601 13th Street, N.W.,
Suite 850 South
Washington, D.C. 20005
(202) 662-4300
(202) 662-4315 (Fax)

(*Persons designated for service in accordance with Rule 203, 18 C.F.R. § 385.203, of the Commission's Rules of Practice and Procedure.) Midwestern requests that the Commission waive Rule 203(b)(3) to allow designated service to four persons.)

Appendix D

II.

PROPOSED OPERATIONS

Midwestern proposes to install a tap on its system located at approximately Milepost 2111-1+17.5 in Knox County, Indiana. Scepter requested the new delivery point to serve its industrial plant. More specifically, Midwestern will install, own and operate a 2-inch hot tap, check valve and electronic gas measurement (EGM) including communication equipment. Scepter will install, own, operate and maintain approximately 200 feet of 2-inch interconnect pipe. Scepter will also install, own and maintain measurement facilities. Midwestern will operate the measurement equipment. Scepter will reimburse Midwestern for the estimated cost of the tap facilities, $32,300.

Upon completion of the facilities to serve Scepter, Midwestern will transport up to 862 dekatherms per day of natural gas on an interruptible basis pursuant to the terms of Midwestern's Rate Schedule IT. Such services will be provided pursuant to Midwestern's blanket transportation certificate and will therefore be within the certificated entitlements of Scepter at this location.[1]

Pursuant to § 157.211(a)(2) of the Commission's regulations, Midwestern notes that Southern Indiana Gas and Electric Company ("SIGECO"), a local distribution company ("LDC"), currently provides natural gas service to the Scepter industrial plant. Additionally, Midwestern

1. Midwestern Gas Transmission Company, 50 FERC ¶ 61,227 (1990), Docket No. CP90-174.

will comply with § 284.223(b) by providing, prior to commencement of natural gas service, written notice to SIGECO and its regulatory agency.

III.

ENVIRONMENTAL MATTERS

Midwestern submits herewith the environmental clearance letters received from the following agencies: U.S. Fish and Wildlife Service and the Indiana Department of Natural Resources. These letters are included as Attachment A. Attachment B contains a map and schematic showing the location of the proposed project. This project is located in an agricultural field.

V.

IMPACT ON PEAK DAY DELIVERIES

The installation of this delivery point will not have a significant impact on Midwestern's annual deliveries or peak day operations because the proposed service is interruptible.

VI.

MISCELLANEOUS

Midwestern will provide written notification to the Commission within thirty days of the commencement of this service. Midwestern will install and operate the proposed facilities in compliance with 18 C.F.R. Part 157, Subpart F.

Further, Midwestern has sufficient capacity to render the proposed service without detriment or disadvantage to its other existing customers and its tariff does not prohibit the proposed installation of facilities. Midwestern knows of no other applications, which are related to the instant filing.

VII.

FORM OF NOTICE

A notice suitable for publication in the Federal Register is included herewith and incorporated herein by reference.

VIII.

CONCLUSION

WHEREFORE, Midwestern requests that the Commission, after giving public notice of this filing, allow Midwestern to construct these facilities as proposed herein in order to provide transportation service to Scepter as described above.

Respectfully submitted,

MIDWESTERN GAS
TRANSMISSION COMPANY

By s/ David E. Maranville
David E. Maranville, Counsel

APPENDIX E — AFFIDAVIT OF MIKE A. STOKDYK DATED APRIL 26, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 00-0592-C-H/G

MIDWESTERN GAS TRANSMISSION COMPANY, a Delaware corporation,

Plaintiff,

vs

INDIANA UTILITY REGULATORY COMMISSION and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, an Indiana corporation,

Defendants.

AFFIDAVIT OF MIKE A. STOKDYK

Mike A. Stokdyk, being first duly sworn, states:

1. I am employed by El Paso Energy Company, which owns one hundred percent of plaintiff Midwestern Gas Transmission Company, as its Manager of Business Development. In this capacity, my responsibilities include attracting and making commercial arrangements for new transportation customers to Midwestern's system. I have held this position since 1995. Prior to that time, my responsibilities included work in field operations, engineering, operations

and facility planning, strategic planning and international operations. In all, I have over sixteen years of experience in the natural gas pipeline industry. As a result of my work, I have personal knowledge of the matters set forth in this Affidavit and if called would so testify.

2. Plaintiff Midwestern owns and operates an interstate natural gas pipeline engaged in the interstate transportation of natural gas. Midwestern's pipeline runs through four States with terminal points in Tennessee and Illinois.

3. Exhibit A to this Affidavit is a true copy of a Firm Gas Transportation Agreement by and between Midwestern and Grain Processing Corporation (GPC) dated December 4, 1997. As described in that contract, the business arrangement between Midwestern and GPC involves GPC's use of Midwestern's interstate pipeline to transport the gas to GPC's, adjacent Indiana facility. The Midwestern-GPC transaction involves no sale of gas by Midwestern to GPC. Rather, GPC utilizes Midwestern's interstate pipeline system exclusively for interstate transportation of has purchased by GPC outside of Indiana from third parties.

4. Exhibit B to this Affidavit is a true copy of a Firm Gas Transportation Agreement by and between Midwestern and Scepter, Inc. dated March 1, 2000. The Midwestern-Scepter contract likewise concerns the construction and operation of interstate pipeline and related facilities to connect Scepter's Indiana facility to Midwestern's adjacent interstate natural gas pipeline. As with GPC, the parties' business arrangement involves no sale of gas by Midwestern to Scepter. Rather, Scepter is purchasing gas outside of

Indiana from third parties and then utilizing Midwestern's interstate services solely to transport the gas to Scepter's Indiana facility.

5. Exhibit C to this Affidavit is a true copy of Midwestern's application to the Federal Energy Regulatory Commission in Docket No. CP00-5-000 for authorization to proceed with the construction and operation of facilities to provide interstate natural gas transportation service to Scepter.

6. Exhibits D-1 and D-2 to this Affidavit are true copies of petitions filed by Southern Indiana Gas and Electric Company before the Indiana Utility Regulatory Commission in Cause Nos. 41632 and 41633.

7. On the basis of my over sixteen years of experience in the natural gas industry as described in paragraph 1 above, it is my opinion that should the Indiana Utility Regulatory Commission order Midwestern to cease providing interstate transportation service to its customers, GPC and Scepter, that one result of such an order would be the further disruption of Midwestern's business arrangements with these parties and, potentially, a consequent loss of commercial goodwill. While such a loss of commercial goodwill is intangible and cannot easily be translated into dollar terms, it is, potentially, a serious form of harm to Midwestern's business interests.

8. The foregoing statements are true to the best of my knowledge and belief.

s/ Mike A. Stokdyk
Mike A. Stokdyk

(5)

Supreme Court, U.S.
FILED
APR 8 2002
CLERK

No. 01-1134

IN THE

Supreme Court of the United States

William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

Midwestern Gas Transmission Company and Southern Indiana Gas and Electric Company,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief *Amicus Curiae* of the Interstate Natural Gas Association of America In Opposition to Petition

Arnold B. Podgorsky
Counsel of Record
Jeffrey G. DiSciullo
Michael E. Haddad
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amicus Curiae Interstate Natural Gas Associationof America

Balmar Legal Publishing Services, Falls Church, VA 22042 (703) 289-9000

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IN THE

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Petitioners,

v.

Midwestern Gas Transmission Company and Southern Indiana Gas and Electric Company,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief *Amicus Curiae* of the Interstate Natural Gas Association of America In Opposition to Petition

This brief *amicus curiae* of the Interstate Natural Gas Association of America (INGAA)[1] is submitted in opposition to the petition for a writ of certiorari filed by William D.

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* and its members are contributing monetarily to the preparation or submission of this brief. The petitioner and respondents have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission (hereinafter "petitioner" or "IURC"). The petition seeks review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Midwestern Gas Transmission Co. v. William D. McCarty, et al.*, 270 F.3d 536 (7th Cir. 2001), reproduced at Pet. App. A at 1a-8a.

INTRODUCTION

Amicus INGAA is a trade organization representing interstate natural gas transmission pipeline companies operating in the United States, Canada and Mexico. Through the ownership and operation of over 288,000 miles of pipeline transmission facilities, INGAA's member companies account for over 95 percent of the nation's natural gas deliveries. *Amicus* monitors regulatory, legislative and judicial proceedings of interest to the gas pipeline industry. *Amicus* has elected to participate here, on behalf of its members, given the potentially disruptive, industry-wide implications of IURC's petition.[2]

IURC urges review of the Seventh Circuit's decision, challenging the court's holding that the authority of the Federal Energy Regulatory Commission over the interstate

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[2] An illustrative measure of the potential disruption facing the industry as a result of IURC's petition is the number of Lexis "hits" (Energy library; FERC file) connecting the terms "by-pass" and "distribution or LDC." Literally dozens of cases contain the connected phrases and a cursory review confirms that many involve fact patterns materially indistinguishable from the instant case. *See, e.g., Williams Natural Gas Co.*, 81 FERC ¶ 61,301 (1997); *Algonquin Natural Gas Co.*, 95 FERC ¶ 61,138 (2001); and *Texas Eastern Transmission Corp.*, 85 FERC ¶ 61,324 (1998). All of the cited cases reflect the Commission's consistent treatment of by-pass transportation by an interstate pipeline to direct gas users as "interstate commerce" subject to FERC regulation under the NGA.

transportation of natural gas preempted state regulation. In the court's view, a finding of preemption rendered *Younger v. Harris*[3] abstention principles inapplicable. In addition, and perhaps more fundamentally, the Seventh Circuit recognized that there was no "on-going" state proceeding in which IURC's *Younger* abstention claims were even theoretically cognizable. This is because during the time that the issues regarding preemption were being considered and finally decided by FERC, the IURC had stayed its own proceeding. Thus, as the Seventh Circuit properly recognized:

> [*Younger*] has no application to a case such as this, in which, because of dual federal-state jurisdiction over an activity, here the sale and distribution of natural gas, a federal proceeding (here before the Federal Energy Regulatory Commission) overlapping the state proceeding reaches completion while the state proceeding is still pending at an early stage. There is no affront to the state's prerogative of enforcing its own laws when valid federal law has created a federal forum for the determination of issues that the state proceeding would be able to consider and the proceeding in the federal forum determines those issues before the counterpart state forum is ready to do so.

270 F.3d at 537-38. The Seventh Circuit's decision was unanimous and, as petitioner concedes, reached the same results as three other courts of appeals that considered the same (or similar) issues and facts. Nonetheless, IURC insists that the Seventh Circuit's decision compromises state sovereignty and does so in a manner contrary to this Court's holdings in *New Orleans Public Service, Inc. v. Council of New Orleans*[4] and *Younger*.

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[3] *Younger v. Harris*, 401 U.S. 37 (1971).

[4] *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*").

Amicus INGAA disagrees. Petitioner has, at most, alleged peripheral dicta distinctions between the Seventh Circuit's rationale and the rationale advanced by other circuit courts considering similar preemption and *Younger* abstention claims. Indeed, on the critical issue of whether the Seventh Circuit's holding comports with the holdings of other federal courts, petitioner acknowledges that the Seventh Circuit's decision is in "agreement...[with] three or four [other] circuits" and that courts of appeals deciding the same preemption issues have been "heretofore unanimous." Pet. at 15, n.8.

This concession should end the inquiry. Nothing in the record below suggests that this case presents special or important reasons to justify invocation of this Court's supervisory powers. No basis exists for excavating an area of law that is well-settled, and no compelling grounds have been offered for disturbing the established scheme of federal regulation under which Midwestern's, and countless similar transport arrangements, have been authorized. *Amicus* INGAA therefore urges that the IURC's petition be denied.

STATEMENT OF INTEREST OF *AMICUS* INGAA

The constituent members of *amicus* INGAA are, for the most part, interstate pipeline companies operating within the lower 48 states. The facilities owned by these member companies, and the services they provide, are generally subject to federal regulation under the Natural Gas Act. *See* 15 U.S.C § 717, *et seq.*

For over six decades the member companies of *amicus* have been required to seek FPC/FERC[5] approval in

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[5] The Federal Power Commission was the predecessor agency to the Federal Energy Regulatory Commission. By virtue of the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), many of the Federal Power Commission's functions were transferred to FERC (with the balance of the functions transferred to the

connection with the construction of facilities used in the transportation of gas in interstate commerce. The reach of federal jurisdiction under NGA's statutory framework is limited only by specific, narrow exemptions, the scope of which has been tested, and retested, in numerous cases heard before the agency, the various circuit courts of appeal and this Court.[6]

IURC's petition seeks to upset the prevailing scheme of federal regulation under the NGA. In the process, the regulatory status of countless existing transportation arrangements, and future transportation transactions, would be cast in doubt. *See* n. 2, *supra*. FERC initiatives designed to promote competition and consumer choices would be jeopardized, if not derailed. The uncertainty, unpredictability and potential disruption invited by IURC's petition compelled INGAA to seek participation *amicus curiae*.

REASONS FOR DENYING THE WRIT

The issues decided by the Seventh Circuit are not novel. They were not resolved in a way that is ambiguous or unclear. They do not beg for this Court's preeminent guidance or reconciliation. To the contrary, this Court (and several courts of appeal) have already considered the same or similar issues and decided them the same way.

Petitioner claims that the opinion below conflicts with *Younger* and *NOPSI*. In support, petitioner completely ignores the holdings of these decisions, relying instead on dicta and a digression into alleged state interests. More

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Department of Energy). *See, e.g., Puget Sound Power & Light*, 1 FERC ¶ 61,059 (1977) (briefly detailing the transfer of functions).

[6] *See, e.g., Williams Natural Gas Co., supra* n.2 (considering scope of "local distribution" exemption); *see also Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1418 (10th Cir. 1992) (same; Court held that local distribution exemption applies to local retail sales, and does not encompass direct transportation by interstate pipeline); and *see infra*, cases discussed n.8.

importantly, petitioner overlooks the chronology of the state and federal administrative proceedings below -- a significant omission given that *Younger* abstention, by definition, requires the existence of an "on-going" state proceeding from which a federal forum may consider abstaining. Here, no such "on-going" state proceeding existed, rendering *Younger*-based arguments inapposite. That the IURC had stayed its state proceeding pending the outcome of the federal proceeding is dispositive of petitioner's *Younger* claims. *See, e.g., Time Warner Cable v. Doyle*, 66 F.3d 867, 874 (7th Cir. 1995) (*Younger* abstention inappropriate where state forum stays its proceedings, pending outcome of federal review of preemption issue).

Furthermore, even accepting *arguendo* that petitioner's *Younger* claims are properly pled, it is well-settled (and petitioner does not dispute) that *Younger* abstention does not apply in cases where the state is presuming to act in a matter(s) that is preempted by federal law. *NOPSI*, 491 U.S. at 366-67. In these circumstances, the state cannot demonstrate a "valid interest" that would meet the threshold condition required under *Younger*. Indeed, where preempted, the state's interest would be manifestly invalid.

The Seventh Circuit's preemption finding is unassailable and preserves decades of regulatory jurisprudence. IURC's claim that the court adopted an equivocal ("seems to us") standard for preemption analysis purposes is incorrect. The Seventh Circuit, citing no fewer than five Supreme Court and circuit court decisions, unequivocally held that the Commission's jurisdiction over interstate transportation of gas, including gas bought from out-of-state sources and delivered directly to Indiana end-users, "is exclusive" and that, consequently, "state regulation is preempted." Pet. App. 4a.

Nonetheless, IURC maintains that the jurisdictional status of the transportation at issue is sufficiently ambiguous to warrant further scrutiny. The lower court's preemption determination, according to IURC, cannot possibly stand

without a more exhaustive inquiry, by the IURC, to determine whether Midwestern's delivery of gas across state lines to Indiana purchasers constitutes exempt "local distribution" (subject to state regulation) or "interstate commerce" (subject to federal regulation).

Again, IURC's arguments are procedurally and substantively flawed. In the first place, FERC is the agency charged with implementing "the statute in question"[7], including determining the scope if its own jurisdiction thereunder. *Federal Power Commission v. Louisiana Power & Light Co., et al.*, 406 U.S. 621, 647 (1972) (recognizing the primary authority of an agency to determine its own jurisdiction and, quoting an earlier Supreme Court decision, observing that with respect to issues involving jurisdictional scope: "[w]hile the agency's decision is not the last word, it must assuredly be the first.") It was therefore entirely appropriate for FERC to proceed with its review and approval of Midwestern's certificate application, and to dispose of the protests filed by the by-passed local distribution company challenging FERC's jurisdiction.[8]

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[7] *I.e.*, the NGA, since it is the NGA that contains the operative terms "local distribution" and "interstate commerce" that, according to IURC, are critical to any preemption analysis. Pet. at 15-16.

[8] Again, it bears emphasizing that FERC's findings were in all respects consistent with every prior "by-pass" case where jurisdictional issues were raised concerning the pipeline's direct connection into an end-use facility. *See, e.g., Cascade Natural Gas Corp.*, 955 F.2d at 1417 (bypass "undoubtedly falls within...grant of jurisdiction"); *Public Utils. Comm'n of State of Cal.*, 900 F.2d 269, 276 (D.C. Cir. 1990) (holding that FERC has jurisdiction over bypass arrangements); *Michigan Consol. Gas Co. v. Panhandle E. Pipeline Co.*, 887 F.2d 1295 (6th Cir. 1989) (holding that local distribution exemption of the NGA did not apply to bypass arrangement and such arrangements are within FERC's jurisdiction); *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117, 121 (D.C. Cir. 1989) ("[W]e have no difficulty in holding that FERC has jurisdiction over the particular [bypass] arrangement involved in the present controversy."); *and see* n.2, *supra*.

Thus, FERC has already considered the "local distribution" vs. "interstate commerce" argument in the specific context of Midwestern's certificate application and properly concluded that the transportation at issue constituted interstate commerce. *See Midwestern Gas Transmission Co.*, 85 FERC ¶ 61,358 (1998)(n. 14 and accompanying text). *That proceeding, and FERC's jurisdictional determinations, were completed even as the IURC's state proceedings were in a voluntary hold.* With FERC's orders final and no longer subject to review (*i.e.*, by virtue of no party having filed a petition for review in accordance with Section 19(b) of the NGA), there is simply no legitimate procedural vehicle, consistent with collateral estoppel, claim preclusion and preemption principles, by which IURC's state proceeding can be revived.

Substantively, IURC's claims fare no better. Not a single case has been cited to support the proposition that an interstate pipeline, transporting out-of-state volumes to an end-user through an integrated extension of the pipeline's existing system, is engaging in "local distribution" rather than "interstate commerce." But this is not a case where there is merely an absence of affirmative support for petitioner's position. Here, every court that has considered the issue of interstate commerce vs. local distribution has rejected the contention that the integrated, seamless flow of gas deliveries across state lines somehow loses its interstate character (and transforms into local distribution) at some point upstream of the end-use site.

The effect of Sections 87 and 87.5 of the Indiana Code is to establish redundant and unlawful state regulatory requirements governing facilities used for the interstate transportation of gas to end-use consumers in Indiana. Indiana's attempt to regulate in this area tramples the commerce clause of the Constitution, since Congress has entrusted FERC with exclusive jurisdiction over interstate natural gas transportation, including that portion of the interstate transportation that occurs within the state where the

consumer is located. *See* 15 U.S.C. § 717(b). A state statute that conflicts with a federal statute, or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is void. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *see also Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963).

The NGA makes clear that "interstate commerce" is "commerce between any point in a State and any point outside thereof...." 15 U.S.C. § 717(a)(7). Despite the Petitioner's claim that the NGA specifically exempts "local distribution" facilities from federal regulation, *see* 15 U.S.C. § 717(b), this exemption is simply not implicated in the bypass context. The "local distribution" exemption applies to local retail sales. "Congress described the 'local distribution' proviso as 'surplusage' because 'distribution is made only to consumers in connection with sales' and the Commission has no power over direct sales to consumers." *Cascade Natural Gas Corp.*, 955 F.2d at 1418 (*quoting* H.R. Rep. No. 709, 75th Cong., 1st Sess. 3 (1937)). Thus, the exemption upon which Petitioner's case relies reaches no further than the local sale of gas at retail; it does not otherwise abridge FERC's jurisdiction over interstate transportation, which has been consistently defined to include "gas which crosses a state line at any stage of its movement to the ultimate consumer." *California v. Lo-Vaca Gathering Co.,* 379 U.S. 366, 369 (1965); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 163 (1954). As one court noted, the NGA's legislative history (as well as common sense) makes clear that it was not intended "that final delivery to an end user transforms the terminal stage of transportation into distribution." *Public Utils. Comm'n of Cal.*, 900 F.2d at 276 (D.C. Cir. 1990). Every circuit court that has examined the issue has concluded that FERC does indeed have exclusive jurisdiction over bypass arrangements; the "last foot" of the gas's journey is not "distribution" but, rather, still a part of interstate travel. *See* n.8, *supra.*

Having established that Congress intended to grant FERC jurisdiction over interstate transportation bypass arrangements, this Court has held that such grants to FERC are exclusive, not concurrent with any state jurisdiction. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) ("The NGA confers upon FERC *exclusive jurisdiction* over the transportation and sale of natural gas in interstate commerce for resale.") (emphasis added); *see also Public Utils. Comm'n of Cal.*, 900 F.2d at 274 ("[I]f there be Commission jurisdiction over some component of the transaction, it is exclusive over that component."). IURC's petition, which seeks to realign the roles of federal and state regulatory agencies, should be therefore denied.

CONCLUSION

For the reasons set forth herein, *amicus* INGAA respectfully requests that IURC's petition for a writ of certiorari be denied.

Respectfully submitted,

Arnold B. Podgorsky
Counsel of Record
Jeffrey G. DiSciullo
Michael E. Haddad
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amicus Curiae
Interstate Natural Gas
Association Of America

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No. 01-1134

IN THE

Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL AND DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY AND SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE GRAIN PROCESSING CORPORATION'S BRIEF IN SUPPORT OF RESPONDENT MIDWESTERN GAS TRANSMISSION COMPANY'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Teresa Wynn Roseborough
Counsel of Record
William H. Penniman
Katherine P. Yarbrough
Paul B. Turner
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2415
(202) 383-0100
Attorneys for Grain Processing Corporation

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QUESTIONS PRESENTED

Amicus Curiae Grain Processing Corporation concurs with the Questions Presented section of the Brief in Opposition to Petition for Writ of Certiorari of Midwestern Gas Transmission Company.

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Rules of the Supreme Court of the United States

Rule 10 4
Rule 37 1

Pursuant to Supreme Court Rule 37, Amicus Curiae Grain Processing Corporation ("GPC")[1] submits this brief supporting Respondent Midwestern Gas Transmission Company's ("Midwestern") Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536 (7th Cir. 2001) (reproduced in Pet. for Cert. App. at 1a-8a), submitted by William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission ("IURC") (collectively, "State Commissioners").

STATEMENT OF INTEREST OF AMICUS CURIAE GRAIN PROCESSING CORPORATION

GPC is a real party in interest here. GPC intervened and actively participated in the Federal Energy Regulatory Commission ("FERC") proceedings involving Midwestern's application to construct facilities to provide interstate transportation service for GPC, and it participated as an amicus curiae before the Seventh Circuit. GPC submits this brief to present its views as a directly-affected customer of the challenged Midwestern interstate transportation facilities and services and a consumer of interstate natural gas transportation services.

GPC is a manufacturer and marketer of various corn-based products with headquarters and manufacturing facilities in Muscatine, Iowa. The company recently expanded its business through construction of a state-of-the-

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[1] Counsel for GPC authored this brief in whole, and no party other than GPC and its counsel made any monetary contribution to the preparation or submission of this brief. All parties to this proceeding granted consent for GPC to file this brief.

art $300 million corn processing facility in Daviess County, Indiana. GPC requires natural gas for many aspects of its new plant's wet corn-milling processes. Pursuant to Midwestern's FERC-approved tariffs, GPC requested, and Midwestern agreed to construct, an interstate pipeline delivery point and related pipeline facilities to enable Midwestern to transport GPC-owned natural gas from Tennessee directly to GPC's new plant in Indiana. GPC has never taken transportation services or purchased gas from local distribution company ("LDC") Southern Indiana Gas and Electric Company ("SIGECO").

Reliable and economically competitive natural gas supply and transportation services are essential ingredients in GPC's ability to compete effectively in its own markets. Direct access to such services was a specific factor that GPC considered in deciding where to site its facility.

As required by Section 7(c) of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1994) ("NGA"), Midwestern sought and received from FERC a certificate of public convenience and necessity to construct and operate interstate pipeline facilities to provide interstate transportation services to GPC. 15 U.S.C. § 717f(c). FERC rejected jurisdictional and other arguments by SIGECO and approved the requested Midwestern facilities and services to GPC.[2] *No* party to the FERC proceedings sought judicial review of FERC's orders. GPC subsequently completed its new plant and has been receiving transportation service from Midwestern since 1999.

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[2] *See Midwestern Gas Transmission Co.*, 85 F.E.R.C. ¶ 61,358 at 62,396 (1998); *Midwestern Gas Transmission Co.*, 87 F.E.R.C. ¶ 61,169 at 61,671-74 (1999). FERC also determined in these orders that the service and facilities would serve the public convenience and necessity. *See Midwestern*, 87 F.E.R.C. at 61,671.

In constructing its new facility, GPC relied on the NGA and the court-approved regulatory framework for competitive natural gas markets. That framework has created a vibrant national market for natural gas based on nondiscriminatory interstate transportation of natural gas for consumers and competitive suppliers. Shippers like GPC now may contract for interstate transportation of gas among virtually any combination of available receipt and delivery points on an interstate pipeline. LDCs, producers, marketers, and end users now may sell, buy, and ship natural gas virtually anywhere on the interstate transportation grid. And, consumers such as GPC that do not want to pay LDCs for unneeded or burdensome local services can arrange for direct transportation delivery by interstate pipelines, subject to FERC review and approval. As FERC recognized in its consideration of Midwestern's application to construct the pipeline facilities to render interstate gas transportation for GPC, challenged here, "on a national level natural gas consumers," like GPC, "are better served by a competitive natural gas market that encourages improved services at lower costs." *Midwestern*, 87 F.E.R.C. at 61,671.

Within this dynamic, integrated national market for natural gas, GPC chose the sellers of gas and transportation services that best met its needs. It arranged for interstate transportation of GPC-owned gas from sources in other states directly to its Indiana plant. FERC's approval of these interstate transportation services and facilities, after considering all relevant factors, including SIGECO's objections, is entirely consistent with the statutory and regulatory framework for competitive interstate natural gas markets. Giving every state the ability to disapprove such interstate transportation or to add an additional layer of conflicting regulation or to require interposition of a local distribution company's services would balkanize interstate transportation markets and thwart the national markets for

natural gas that Congress wisely left to FERC's regulatory authority.[3]

REASONS FOR DENYING THE PETITION

Rule 10 of this Court's Rules instructs that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Here, the Petition fails to identify any such compelling reason.

1. The Circuits Are Not in Conflict as to the Reach of FERC's Jurisdiction.

Every circuit court to consider the issue has affirmed FERC's exclusive jurisdiction over an interstate pipeline's

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[3] In its Brief in Support of the Petition (SIGECO Br. at 5-7), SIGECO argues, in effect, that requiring customers to take services from LDCs increases competition. FERC considered and rejected similar SIGECO arguments in the administrative proceedings leading to the approval of Midwestern's certificate to serve GPC:

> Under current Commission policy, we strive to honor the decision by an end-user on whether it is economic to undertake direct service from a pipeline supplier. This policy allows all participants in the natural gas market greater access to the market. The Commission has stated that it is not willing to shield local distribution companies from the effects of competitive forces, because it believes that in the final analysis, all consumers will benefit from the Commission's pro-competitive policies.

Midwestern, 85 F.E.R.C. at 62,400. Thus, FERC's policies and orders emphasize allowing customers to choose the natural gas supply and transportation options that the *customers* believe best meet their needs. "[T]he Commission is reluctant to substitute its judgment for that of end-users who select direct service from an interstate pipeline over service through an LDC." *Midwestern*, 87 F.E.R.C. at 61,671. SIGECO did not seek judicial review of FERC's determinations.

construction and operation of continuous pipeline facilities for the direct transportation of a customer's own gas from one state to the end user's facilities in another state – exactly the situation presented in GPC's arrangement.[4] Indeed, FERC (and its predecessor agency, the Federal Power Commission) have been certificating the direct transportation service and facilities for such service to end-use customers for over 60 years.[5]

The State Commissioners (*see, e.g.*, Pet. for Cert. Br. at 2, 3, 4) and SIGECO attempt to escape the reach of this consistent line of authority by characterizing Midwestern's final transportation for GPC as "local distribution" and relying on cases involving retail sales rather than interstate transportation.[6] This Court long has held, however, that the NGA grants to FERC exclusive jurisdiction over interstate

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[4] *See, e.g., Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417 (10th Cir. 1992) (stating that "the disputed matter undoubtedly falls within that grant of jurisdiction"); *Mich. Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989) (stating that "[i]t is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce'"), *cert. denied*, 494 U.S. 1079 (1990); *Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 121 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392 (11th Cir. 1998); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 276 (D.C. Cir. 1990) (holding that FERC's exclusive jurisdiction over interstate transportation reaches to the "last foot of pipe" to accomplish the delivery).

[5] *See, e.g., Ark. La. Gas Co. v. Fed. Power Comm'n*, 113 F.2d 281 (5th Cir. 1940); *Panhandle Eastern Pipe Line Co.*, 3 F.P.C. 1088 (1943); *Panhandle Eastern Pipe Line Co.*, 7 F.P.C. 1121 (1948).

[6] The two cases principally relied upon by the State Commissioners do not call for a different result as both cases involved only the ability of states to regulate *retail sales* by interstate pipelines – not interstate transportation services or facilities. *See Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516-20 (1947); *Panhandle Eastern Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951).

transportation of natural gas,[7] regardless of whether such transportation is "for hire or for sale" or associated with a wholesale or retail sale.[8] "Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate setting*, and in no wise limited the broad base of 'transportation' jurisdiction granted the [FERC]." *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 640 (1972) (hereinafter "LP & L") (emphasis added). Under the NGA, only retail sales of natural gas and low pressure, local delivery systems for making such retail sales were understood to be within the jurisdiction of the states over "local distribution." *See Fed. Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464 (1950).[9] "It is well established that the proviso [concerning local distribution] was added to the [NGA] merely for clarification and was not intended to

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[7] "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981).

[8] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 305 (1988); *United Gas Pipe Line Co. v. Fed. Power Comm'n*, 385 U.S. 83, 89 (1966) ("The [NGA] gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale."); *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 636 (1972) (stating that the NGA's grant of jurisdiction to FERC "applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale").

[9] In response to *East Ohio Gas*, Congress passed § 1(c) of the NGA, 15 U.S.C. § 717(c), the Hinshaw Amendment, granting states authority over local pipeline companies that receive gas from outside the state but whose facilities do not cross any state line and do not transport gas that is ultimately transported to another state.

deprive [FERC] of any jurisdiction otherwise granted by § 1(b)." *LP & L,* 406 U.S. at 637 n.14.[10]

This Court very recently confirmed in the analogous context of the electric industry that local jurisdiction over retail sales does not limit FERC's jurisdiction over interstate transmission of electric power.[11] *See New York v. FERC,* ___U.S. __, 122 S. Ct. 1012 (Mar. 4, 2002). There, despite recent changes in the electric industry comparable to those in the natural gas industry[12] – from a regime of bundled sales to open-access transmission – the Court found the statutory language of the FPA's jurisdictional provision unambiguous:

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[10] *See East Ohio Gas*, 338 U.S. at 470-71 ("[T]he Committee Report [describes] the 'local distribution' proviso as surplusage which was 'not actually necessary.'"). In this regard, the House and Senate Committee reports underlying the NGA, H.R. Rep. No. 709, 75th Cong., 1st Sess. 3 (1937), and S. Rep. No. 1162, 75th Cong., 1st Sess. 3 (1937), stated: "That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character."

[11] Despite some differences between the NGA and the Federal Power Act, 16 U.S.C. §§ 791a-825r (1994) ("FPA"), both empower FERC to regulate the rates and services for interstate transportation or transmission and wholesales, while leaving local distribution to state regulators. *Compare* NGA, 15 U.S.C. § 717(b) *to* FPA, 16 U.S.C. § 824(b)(1). Recognizing these similarities, the courts often have stated that the statutes are to be interpreted *in pari materia, i.e.*, precedents from one are at least presumptively applicable to the other. *See, e.g., Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 281 (1976).

[12] The natural gas industry went through a similar change several years before comparable power industry changes. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 283-84 (1997) (discussing the unbundling of the interstate natural gas transportation market); Richard J. Pierce, Jr., *The Evolution of Natural Gas Regulatory Policy*, 10-SUM Nat. Resources & Env't 53 (1995).

"There is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sale* jurisdiction to that at wholesale." 122 S. Ct. at 1022 (emphasis added). The statutory text "*unambiguously authorizes*" FERC to assert jurisdiction over "interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer[;] FERC's exercise of this power is valid." *Id.* at 1024 (emphasis added). Given this recent decision on issues nearly identical to those raised by the State Commissioners' Petition and the lack of conflict among the circuits, there is no compelling reason for this Court to grant the Petition for Writ of Certiorari.

2. The Seventh Circuit Applied the Appropriate Abstention Standards.

The State Commissioners do not identify a split involving abstention and the implementation of the *Younger*[13] doctrine by the circuits. Instead, they allege a conflict between the Seventh Circuit's decision and this Court's *Younger* abstention jurisprudence. However, there is no such conflict. In *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 491 U.S. 350 (1989) (hereinafter "*NOPSI*"), this Court states that, even where the elements of *Younger* are met, it is possible that abstention would not be warranted where a claim of preemption is "facially conclusive" or

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13 *Younger v. Harris*, 401 U.S. 37 (1971).

where the underlying state proceeding is flagrantly and patently preempted by federal law.[14]

The Seventh Circuit faithfully applied these standards, finding that the IURC's proceeding was completely and clearly preempted and that abstention, therefore, was not appropriate.[15] *See* Pet. for Cert. App. at 4a (stating that the NGA grants FERC exclusive jurisdiction over the interstate transportation of natural gas and that state regulation therefore is preempted); *id.* at 6a (stating that *Younger* abstention was inappropriate because the state has no legitimate interest in seeking to regulate activities that are clearly under exclusive federal control);[16] *cf. id.* at 3a (relying on *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n.8 (1977), which states that "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in state court."). The Seventh Circuit required no further fact-finding in reaching its conclusion that Midwestern's claim of preemption was facially conclusive, based here on

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[14] *Id.* at 366-67. There, this Court expressly refrained from deciding whether abstention was appropriate where the underlying proceeding was a state administrative proceeding. *Id.* at 369 & n.4. Also in *NOPSI*, this Court discussed an earlier case, *Pub. Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 468-69 (1943), where the Court upheld a permanent injunction where the orders of the state commission were "on their face plainly invalid." 491 U.S. at 366.

[15] The State Commissioners similarly suggest that other courts of appeals' decisions also may be inconsistent with *NOPSI*. Because, however, the Seventh Circuit's decision neither conflicts with other circuits nor Supreme Court precedent, the Court should not grant the Petition for Writ of Certiorari.

[16] This Court in *New York, supra*, recently reached a similar conclusion with respect to the FPA. There, this Court found that, if FERC acts within the scope of its federal authority, state law is conclusively preempted. 122 S. Ct. at 1023-24.

consistent case law and the NGA's unqualified grant to FERC of jurisdiction to regulate the interstate transportation facilities and services of interstate pipeline companies.[17]

3. The Procedural Posture of the Case Makes Review Inappropriate.

Allowing the IURC proceeding to go forward would be allowing an impermissible collateral attack upon FERC's orders. Under Section 19(b) of the NGA,[18] Congress has mandated that the *exclusive* remedy for those, including states and their agencies, aggrieved by a FERC order is to file a petition for review in an appropriate court of appeals.[19] *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-36 (1958) ("Congress . . . prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders [under the FPA]"); *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499 (1955) ("Section 19(b) [of the NGA] reflects the policy that a party must exhaust its administrative remedies before

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[17] Preemption also is clear and complete because IURC regulation of FERC-approved facilities and transportation services to GPC would create collisions of authority and real, unavoidable conflicts. For example, it would be impossible for Midwestern simultaneously to comply with the IURC's regulation as a "public utility" and FERC's comprehensive NGA regulation of Midwestern's transportation facilities, rates and services to GPC. *Cf. Schneidewind, supra.*

[18] 15 U.S.C. § 717r(b).

[19] The NGA is replete with examples of Congress' expectation for state agencies to participate and to intervene in FERC proceedings. *See* NGA § 13 (allowing states to initiate complaints against natural gas companies); § 15 (allowing the Commission to allow states to intervene in FERC proceedings); § 17 (allowing the Commission to refer matters to boards established by the Commission composed of representatives of the states); § 19 (allowing states to file for rehearing of Commission orders). FERC's rules permit state agencies to intervene as a matter of right. 18 C.F.R. § 385.214(a)(2) (2001).

seeking judicial review."). Nor have states been reticent to participate before FERC, to seek review of FERC's orders by an appropriate U.S. court of appeals, and ultimately to file a petition for writ of certiorari with this Court. *See, e.g., New York, supra*; *Pub. Utils. Comm'n of Cal., supra.*

Permitting repeated collateral attacks on FERC decisions would undermine the stability of that agency's determinations and would frustrate the congressionally-mandated scheme for regulating interstate natural gas transportation. A breakdown in this dynamic, integrated national market for natural gas could have severe consequences for natural gas pipelines, producers, and customers, such as GPC, that need to be able to make decisions based upon the governing statutes and specific FERC orders in areas committed wholly to FERC's jurisdiction. Allowing opponents to disregard the statutorily-prescribed forums and then launch collateral attacks would undermine coherent regulation of interstate natural gas markets. This is especially true here, where FERC already has considered and approved Midwestern's facilities and services as being required by the public convenience and necessity.

Both SIGECO and the State of Indiana participated in the FERC proceeding involving GPC.[20] The IOUCC did not file a protest, request rehearing, or file a petition for review. Likewise, SIGECO was actively involved in the FERC proceeding involving GPC, raising the same jurisdictional

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[20] The State, through its agent, the Indiana Office of Utility Consumer Counsel ("IOUCC") intervened in the FERC proceedings involving Midwestern's proposed facilities to serve GPC. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940); II Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 13.4 (3d ed. 1994).

arguments it advances before the IURC.[21] Although SIGECO sought rehearing of FERC's decisions determining that FERC had exclusive jurisdiction, SIGECO did not file an appeal of those decisions to an appropriate court of appeals. Neither an agency of the State of Indiana nor SIGECO may now collaterally attack FERC's orders through the IURC proceedings.

Finally, abstention is not appropriate in instances where the underlying administrative proceeding has been stayed. Despite the State Commissioners' assertions in litigation that the federal courts should abstain based on the purported significant state interest here,[22] the IURC has not lifted the stay in the state proceeding; there simply is no active, ongoing underlying state proceeding in favor of which the federal courts should abstain.[23]

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[21] Apparently recognizing that the federal court of appeals is the appropriate avenue for SIGECO to challenge FERC's jurisdictional conclusions, the IURC stayed its own proceeding while the jurisdictional issue was resolved in federal forums, stating "we are in effect deferring the federal preemption issue for resolution by federal forums." (Opp. to Cert. App. at 57a). *In re: Southern Indiana Gas and Electric Co.*, Cause No. 41197, 1999 WL 236853, at *7 (Ind. U.R.C. Jan. 27, 1999) ("Stay Order").

[22] In its Stay Order, the IURC did not propound a strong state interest in these transactions. There, the IURC: (i) openly questioned whether it could even address the preemption issue (it acknowledged that its function is to enforce statutes entrusted to it rather than find them unconstitutional); and (ii) recognized that the weight of federal decisions indicated that "the application of the Indiana statutes . . . would not survive a federal challenge." (Opp. to Cert. App. at 55a-57a).

[23] *See Time Warner Cable v. Doyle*, 66 F.3d 867, 874 n.6 (7th Cir. 1995) (stating that there was no cause for *Younger* abstention where administrative agency stayed proceeding, pending resolution in federal court), *cert. denied*, 516 U.S. 1141 (1996).

CONCLUSION

WHEREFORE, for the reasons set forth herein, Amicus Curiae Grain Processing Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Teresa Wynn Roseborough
Teresa Wynn Roseborough
Counsel of Record
William H. Penniman
Katherine P. Yarbrough
Paul B. Turner
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2415
(202) 383-0100
Attorneys for
Grain Processing Corporation

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In The
Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Stephen R. Carter
Attorney General
Gary Damon Secrest
Chief Counsel
Counsel of Record
Indiana Government Center South
402 West Washington Street
5th Floor
Indianapolis, Indiana 46204
(317) 232-6315

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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REPLY BRIEF FOR PETITIONERS

The court of appeals has taken from the State of Indiana an important aspect of its sovereignty which *Younger*,[1] *NOPSI*,[2] Congress, and the Eleventh Amendment protect. This intrusion leaves Indiana powerless to evaluate and protect local interests vital to its citizens, land, and economy. The court of appeals has violated fundamental requirements of *Younger* and *NOPSI* to define a state's interests broadly, and to enjoin a state's determination of the constitutionality of its own statutes *only* when such laws are *conclusively* shown to be "flagrantly and patently" unconstitutional. Instead, and entirely without justification, the court of appeals characterized Indiana's interests as parochial and protectionist. The court also substituted presumption and appearance for the district court's careful and restrained analysis of the abstention question.

The conflicts with *Younger* and *NOPSI* are no less offensive to state sovereignty when a conflict has yet to develop on the underlying constitutional issue. As the district court correctly observed, the "issue presented" under *Younger* was "only whether the result" of the preemption "debate is so clear that any effort by the Indiana Commission to exercise jurisdiction . . . would be 'flagrantly and patently' unconstitutional." Pet. App. 59a. Contrary to the arguments of the several opponents to *certiorari*, the issue is not settled or resolved. The preemption question with respect to natural gas bypass deliveries has not been decided by this Court, by anything approaching a majority of the circuits, or by any state court of last resort. In fact, the result of the decision by the court of appeals is that *no* state court has the opportunity to address the issues of preemption.

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1 *Younger v. Harris*, 401 U.S. 37 (1971).

2 *New Orleans Pub. Serv. Inc. v. Council Of New Orleans*, 491 U.S. 350 (1989).

I. Indiana's Interests Cannot Be Extinguished By A FERC Permit Proceeding In Which It Neither Appeared Nor Participated.

A. Estoppel is not an exception to *Younger*.

Midwestern and its *amici* claim that the IURC enforcement proceedings were collaterally estopped by the FERC permit proceedings. This argument was correctly rejected by the district court, which found that the "short answer" is that the IURC "was not a party to the FERC proceeding" and therefore "is not bound by any conclusions FERC reached." Pet. App. 63a. The court of appeals similarly dismissed the point in the first moments of oral argument, given that Midwestern had abandoned the argument in its appellate brief (saying "maybe" the IURC is estopped, but the court "need not decide," Midwestern App. Br. 17-20). Seventh Circuit precedents also hold that an injunction will not be issued "when the plaintiff has an adequate remedy at law, which he does if he can assert the ground on which he seeks an injunction [here estoppel] as a defense to the very proceeding that the injunction would put a stop to." *Arkebauer v. Kiley*, 985 F.2d 1351, 1358 (7th Cir. 1993), quoting *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 490 (7th Cir. 1984).

There is no merit in Midwestern's assertion that the Indiana Utility Consumer Counselor's ("UCC's") nominal appearance in the FERC proceedings somehow estops the IURC from enforcing Indiana law. Midwestern and the amici distort beyond recognition the Court's opinion in *Sunshine Anthracite Coal Co. v. Adams*, 310 U.S. 381, 403 (1940), which actually said the "crucial point is whether or not in the earlier litigation the representative" that participated, here the UCC, "had authority to represent" the interests of the IURC or the entire State of Indiana "in a final adjudication of the issue in controversy." The UCC was never given any such authority, and it would be error to presume otherwise. *See King v. Walters*, 190 F.3d 784, 790

(7th Cir. 1999) ("wrong to assume that estoppel principles applied" when record did not "reveal . . . the requisite actual authority"). The Indiana statute establishes the UCC as a public advocate *before* the IURC and the state departments of revenue and transportation; the UCC does not appear or function *on behalf of* the IURC and these departments. Ind. Code § 8-1-1. The UCC does not represent either the IURC or the entire State of Indiana.

Section 19(b) of the NGA, upon which Midwestern and its *amici* rely, is limited to *parties* to a FERC proceeding: "any party to a proceeding under this chapter aggrieved by an order issued by [FERC] may obtain review of such order in the Court of Appeals of the United States . . ." 15 U.S.C. § 717r(b). Neither the IURC nor the State of Indiana were parties in the FERC proceeding which the *certiorari* opponents now claim estops the IURC enforcement proceedings.[3]

Midwestern essentially argues for a federal injunction against the state itself. Under such a regime, no state court could decide the constitutionality of its own statute if a federal agency finds that statute preempted. *But see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring) ("where a plaintiff seeks to divest the state of all regulatory power . . . it simply cannot be said that the suit is not a suit against the state"). Pursuant to Articles III and VI of the United States Constitution, the federal circuit courts of appeals and the state courts of last resort are "coordinate courts," equally subject to the "supervisory jurisdiction of the Supreme Court of the United States." *United States v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970). Until the "Supreme Court has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law." *Id.*; *see also Indiana Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 468

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3 Petitioners have found no decision by any court holding that a FERC ruling binds a state or state agency that has not elected to appear before FERC, and Midwestern cites none.

(Ind. 1993) ("lower federal court decisions . . . have non-binding authority on state courts"). The Constitution and its principles of federalism do not allow the subordinate federal courts, let alone FERC, to divest the states of their sovereign powers.

B. The fiction of a "completed" federal litigation.

The FERC proceedings here were not judicial in nature, but were routine permit proceedings that, but for SIGECO's intervention, would have been completed by automatic approval in as few as 45 days. The IURC did not intervene or participate in the FERC proceedings in any way.

The IURC's enforcement proceedings were initiated within a few weeks after Midwestern and its customers disclosed their agreement through the permit filings with FERC. (In such cases, FERC will virtually always receive the first filing given that the underlying agreement has been made between the pipeline company and the customer.) Midwestern actively participated for many months in the IURC proceedings -- including by seeking a legal ruling on the preemption issue -- only until it obtained the FERC permits it sought. That is when it changed course and filed its collateral federal lawsuit seeking an injunction against the ongoing IURC enforcement proceedings. The notion of a "completed" federal litigation here (Br.19-20) is fiction. Midwestern obtained FERC approval while the IURC's proceedings were underway, and sought federal injunctive protection from the completion of those enforcement proceedings.

C. A temporary stay, without voluntary submission to federal jurisdiction, does not waive state enforcement power.

The briefs opposing *certiorari* also wrongly argue that the IURC's temporary stay is somehow "dispositive of" the *Younger* issues, and mischaracterize the Seventh Circuit's opinion in *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1994), as supporting this proposition. *See, e.g.*, INGAA Br. 6; GPC Br. 12. In *Time Warner*, the court noted that any waiver resulted from the state's *failure to argue abstention*, not from its temporary stay of the state proceedings. 66 F.3d at 874 n.6. Similarly, in other opinions, the Seventh Circuit has made clear that abstention may be waived only "affirmatively," such as by "expressly urging the district court to address the merits of the case." *See Int'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 361 n.4 (7th Cir. 1998) (citing *Time Warner*); *see also Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195, 197-98 (1st Cir. 1986) (affirming *Younger* abstention even though state court proceeding voluntarily stayed). The IURC has actively resisted federal intervention from the outset of this case. As Midwestern's counsel necessarily admitted to the district judge, the IURC is "prepared to go forward. . . . It has not let go [and is] attempting to enforce state law." SA 3-4.[4]

II. Indiana's Interests In Local Gas Delivery Services And Facilities Remain Vitally Important Regardless Of The Location Or Nature Of The Sale.

Midwestern (Br. 16-17) questions whether the State's interest is in the regulation of utilities generally, or in the regulation of the service of local distribution and the

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4 The temporary stay was entered at a time when the FERC proceedings might have mooted the issue (though they ultimately did not). That the IURC did not press forward while subsequently being sued in federal court -- and vigorously arguing for abstension -- is certainly no basis to question the State's interest in enforcing its laws.

facilities constructed for that purpose. The distinction is immaterial because Congress and this Court have recognized both as being vitally important to states. *See* Petition, 17-19.

Midwestern, like the court of appeals, also asserts that a state has no legitimate interest "where its actions clearly encroach upon an exclusive federal domain." Br. 18. This is not the standard required by *NOPSI*, and merely begs the question of whether Midwestern's local delivery service and facilities -- which are used solely to parcel out gas to individual customers within Indiana -- are in the state or federal "domain."

None of the *certiorari* opponents explain why a state's interest in local gas delivery service disappears when the sale occurs outside the state. Indiana's interests in the direct local delivery of natural gas to end-use consumers are no less real or vital whether the sale has occurred in Oklahoma or Indiana. The Court directly recognized this fact in *General Motors Corp. v. Tracy*, 519 U.S. 278, 305 (1997), when it said the circumstances -- including the states' interests -- in the new, unbundled market were "remarkably similar" to those it considered in *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951).

The state interests recognized by this Court in *Tracy* and *Panhandle* are no less present, vital, or urgent simply because the provision of service is unbundled and any sales are arranged or consummated in another state. None of the interests in public health and welfare, efficiency, and convenience have been obviated or diminished by the recent changes in the economies of the market. The merits and benefits of deregulation are not materially threatened by a continuing recognition of the states' vital interests, which have long been recognized by this Court and Congress.

III. Midwestern's Arguments Do Not Satisfy Any Recognized Exception To *Younger* Abstention.

A. No basis to claim the Commissioners have been harassing or vexatious.

Midwestern quotes frequently the court of appeals' gratuitous descriptions of SIGECO's referrals to the IURC as "harassing" or "vexatious." Of course, the court of appeals did not say that the IURC had taken any action that could be described as harassing or vexatious. The district court had reviewed early allegations of this kind and found "no evidence of harassment or bad faith on the part of SIGECO, let alone the Indiana Commissioners." Pet. App. 33a. Nor could any such allegation be made against the IURC, who indisputably are discharging their sworn duties to enforce Indiana law. *See* Ind. Code § 8-1-2-115 ("the commission *shall inquire*" into any "violation of the statutes of this state and "it *shall be its duty* to enforce" such statutes) (*emphasis added*).

B. The Court should not assume that the State will disfavor pipelines or ignore state laws requiring open access and reasonable rates by LDCs.

Midwestern builds a number of its arguments on the faulty premise that recognizing state regulatory power over local gas delivery services and facilities means a transfer of "monopoly power" to LDCs -- *i.e.*, the power to exclude pipeline companies from this business. *See, e.g.*, Br. 14, 28. However, the IURC is required by its enabling statute to make decisions in the *public* interest, not in the interest of the LDCs. Ind. Code § 8-1-2-87.5. If a pipeline's proposal for local delivery service best meets the interests of Indiana citizens and ratepayers, it will be approved. There is no basis to assume otherwise.

Similarly, to the extent LDCs continue to provide local delivery service to industrial consumers, the IURC consistently requires that these services be provided on an open-access basis and at reasonable, non-discriminatory rates. There is no basis to suggest that the IURC will defy Indiana law and the public interest of the State of Indiana by erecting discriminatory blockades against delivery to industrial consumers.

C. Federal preemption of the Indiana statutes is far from "flagrant" or "patent"; *New York v. FERC* does not address the question.

Respondent acknowledges that simply asserting preemption is insufficient to render preemption patent. Br. 17. But it does not suggest what standard must be met for sufficient flagrancy or patency; that is, when a federal court would not be second-guessing the issue to be litigated in state court. The logical answer is when either this Court or Congress has explicitly decided the question in such a manner that no reasonable judge could rule differently.[5]

No *state* appellate court, nor any authority that would bind a state court or agency, has decided the jurisdictional question. Midwestern initially asked the IURC to certify the question to the Indiana appellate courts, but then withdrew that request in order to pursue a federal injunction. The Court should be skeptical when the respondent and supporting *amici* require 70 pages to argue that a legal conclusion is so obvious and "clear" that Indiana courts should not be allowed even to consider it.

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5 Petitioners recognize that in other circumstances such difficult statutory construction would not be required -- for example, if a state's law purported to allow its regulators to order interstate pipeline curtailments or set transportation rates governing the transmission of gas by the pipeline to the LDC.

Skepticism is especially warranted when the respondent overstates that "every circuit has found [the preemption question] to be clear, beyond any doubt" and that all of those circuit court decisions "were affirmed by this Court[]." Br. 2. The fact is, only three circuit courts have addressed the issue, employing differing and even inconsistent reasoning. This Court has hardly affirmed such opinions when its only citation to them, in *General Motors Corp. v. Tracy*, expressly *declined* to pass upon their merit. The three circuit court opinions were not cited or mentioned in, let alone affirmed by, *New York v. FERC*, ___ U.S. ___, 122 S.Ct. 1012 (2002).

In fact, the Court emphasized in *New York v. FERC* that the questions presented did *not* involve the validity of a state law alleged to conflict with federal agency action, and that in such a case the state law is entitled to a "presumption against preemption." *Id.* at 1023. Thus, the Court stated that when, as here, a state law is alleged to be preempted, it "starts with the assumption that the historical police powers of the state" are "not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Id.* Further, in the *New York* case FERC was *not* regulating an interstate provider's bypass of the local utility but certain local electric utilities' refusal to participate on reasonable terms as part of an interstate electric grid. *See also* SIGECO's Reply, Part II(B). Nothing in *New York v. FERC* makes preemption "patent" here or justifies the court of appeals' invasion of state sovereignty.

CONCLUSION

This Court should grant the petition for a writ of certiorari and halt the circuit courts' dilution of the requirements of *Younger* and *NOPSI* that sustain the fundamental principles of federalism and comity.

Respectfully submitted,
Stephen R. Carter
Attorney General
Gary Damon Secrest
Chief Counsel
Counsel of Record
Indiana Government Center South
5th Floor
402 West Washington Street
Indianapolis, Indiana 46204
(317) 232-6315

Counsel for Petitioners

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In The
Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF RESPONDENT SOUTHERN INDIANA GAS AND ELECTRIC COMPANY IN SUPPORT OF PETITIONERS

Ronald E. Christian
Robert E. Heidorn
Vectren Corporation
Hulman Building
20 NW Fourth Street
Evansville, Indiana 47708
(812) 491-4202

Wayne C. Turner
Counsel of Record
Anne L. Cowgur
Gregory A. Neibarger
McTurnan & Turner
2400 Market Tower
10 West Market Street
Indianapolis, Indiana 46204
(317) 464-8181

Counsel for Respondent Southern Indiana Gas and Electric Company

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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REPLY BRIEF OF SOUTHERN INDIANA GAS AND ELECTRIC COMPANY IN SUPPORT OF PETITIONERS

This case presents important questions of comity and federalism, and the Court's recognition in *Younger v. Harris*, 401 U.S. 37 (1971), that states must be free to interpret and enforce their laws without interference from the federal judiciary. Respondent Midwestern Gas Transmission Company ("Midwestern") and the *amici curiae*[1] downplay these cert-worthy issues and devote the majority of four briefs to arguing the merits of their underlying preemption claim or defense. But for *Younger* purposes, the question is not whether valid or even compelling arguments support a claim of preemption. The question is whether preemption is, on its face, so conclusively "flagrant and patent" that the State should not be allowed even to address the claim initially.

The Court said in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), that "perhaps" a narrow exception to *Younger* exists for a "facially conclusive" finding that the state law being enforced is "flagrantly and patently" preempted. *Id.* Neither *Younger* nor *NOPSI* legitimized an exception for state laws that "seem" to be "patently *or* facially invalid." The exception, if it exists at all, requires that preemption be *both* "facially conclusive" *and* "flagrant and patent." Under the lesser standards adopted by the Seventh Circuit and by other circuits, the *Younger* issue is lost in federal judicial analysis of the constitutional question that the state tribunal must be trusted to decide. The resulting conflict with *Younger* and *NOPSI* requires the Court's immediate review.

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[1] Grain Processing Corporation ("GPC"), Interstate Natural Gas Association of America ("INGAA"), Scepter, Inc. ("Scepter") and Indiana Industrial Energy Consumers, Inc. ("INDIEC").

I. The Seventh Circuit's Broad Preemption Exception Would Swallow *Younger* Abstention And Defeat Its Purposes.

As the opposition briefs repeatedly argue, the Natural Gas Act ("NGA") gave the Federal Energy Regulatory Commission ("FERC") jurisdiction over two areas: the transportation of gas in interstate commerce and sales for resale. But FERC's authority under the NGA is specifically limited to those areas. Congress did not invade the states' well-established jurisdiction over both: (1) retail sales and (2) local distribution services and facilities. The heart of the underlying dispute is whether a pipeline company's direct delivery of gas to end-users is "local distribution" of natural gas through "facilities for such distribution." The answer to this question is not to be found in the text of the statute "on its face." It requires consideration of competing statutory interpretation canons and analysis of over 75 years of case law, all under the *presumption* that a state's exercise of its historical police power is valid. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

The Seventh Circuit resolved the statutory interpretation dispute *not* by addressing whether the alleged preemption was flagrant or patent, but through the ambiguous pronouncement that "it seems to us" the service at issue was "interstate transportation," to be regulated by FERC, and not "intrastate transportation." Pet. App. 4a.[2]

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[2] Midwestern cannot dispute that the Seventh Circuit's opinion is devoid of analysis of the relevant statute beyond a dismissive "seems to us" statement. Thus, Midwestern tries to attach some significance to the court's parallel assertion that it has "seemed" to three other circuit courts that state regulation of the bypass is preempted. In Midwestern's view, the Seventh Circuit's statement that the local delivery activity at issue "seemed" (in other words, "appeared to be") within FERC's jurisdiction in the opinion of three other circuits transforms the Seventh Circuit's half-hearted discussion of the statute into a "facially conclusive" finding of "flagrant and patent" preemption.

The Seventh Circuit did not even mention the key statutory reservation of state regulatory power over "local distribution," and offered *no* explanation why Midwestern's direct local delivery service to end-users is *not* "local distribution."

The court of appeals' "seems to us" finding does not approach the "facially conclusive" finding of "flagrant and patent" preemption required to avoid *Younger* abstention. In fact, it is not even the "determination of facially clear preemption" that Midwestern characterizes it to be. Br. 1. The Seventh Circuit made no finding that the NGA clearly, on its face, answers the question of whether Midwestern's service of delivering gas to end-users is "local distribution."

The briefs opposing the petition quote the Seventh Circuit's use of the terms "activities that clearly are under exclusive federal control" and "defiance of clear federal law"; but they fail to point out that the Seventh Circuit used these terms only in the context of its misguided guess that SIGECO was somehow urging the State of Indiana to interfere with end-users' choice of *gas commodity suppliers*. Pet. App. 6a-8a. As shown in SIGECO's brief in support of the petition for certiorari, the Seventh Circuit's assertion of "clear" preemption is dependent upon sweeping misstatements of the natural gas industry and the mistaken assumption (indisputably refuted by the record) that Midwestern is not connected to SIGECO's distribution system. SIGECO Br. at 6-7; Pet. App. 14a ("Midwestern's pipeline is also connected to the SIGECO distribution system"). The Court's caveat in *NOPSI* that the need for fact-finding *bars* application of any preemption exception, 491 U.S. at 367, rules out application of an exception built on factual *assumptions* that contradict the undisputed record.

II. If The Court Recognizes A Preemption Exception To *Younger*, It Should Follow *NOPSI*'s Requirement Of "Facially Conclusive" "Flagrant And Patent" Preemption.

Even at the most basic level urged by Midwestern and the amici, the exception to *Younger* requires that the preemption issue be clearly determined, beyond dispute, on its face. The district court correctly found that the issue had not been so determined. Pet. App. 59a.

A. Three Inconsistently Reasoned Circuit Court Opinions Do Not Support A Facially Conclusive Finding.

The briefs in opposition incorrectly imply that the preemption issue is clear on its face because three circuit courts of appeals have reached the conclusion that state regulation of bypass transportation is preempted.[3] Under this theory, agreement among about one quarter of the circuits would defeat *Younger*. (Presumably there is no magic in that number, and Midwestern's argument would be the same if only one or two circuits reached "unequivocal holdings." Br. 17.) The Sixth, Tenth and D.C. Circuit holdings are by no means "conclusive"; they did not bind the district court or the Seventh Circuit, they do not bind the IURC or the Indiana appellate courts, and, they certainly do not bind this Court. Moreover, as the district court noted, the three circuits to consider the preemption issue have "acknowledged the difficulty of the question and have recognized that their decisions were necessarily in tension with at least some Supreme Court opinions, just as the opposite result would produce similar tension with other Supreme Court opinions." Pet. App. 59a.

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[3] Perhaps realizing the weakness of reliance on a small number of circuit courts, Midwestern resorts to hyperbole: "*every circuit* has found [the preemption issue] to be clear." Br. 2 (emphasis added).

In the end the circuits agreed *only* in their ultimate holdings and relied upon varying, even conflicting, rationales. For example, the D.C. Circuit, in *Pub. Util. Comm'n of California v. FERC*, 900 F.2d 269, 275 (D.C. Cir. 1990), adopted the rationale of *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 470 (1950), that FERC jurisdiction extends to "high pressure trunk lines to the point where pressure [is] reduced and the gas enter[s] local mains." This "pressure" test was expressly rejected, however, by the Tenth Circuit in *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992). Instead, the Tenth Circuit pronounced that "local distribution" requires both "the retail sale of natural gas and its local delivery" and occurs at the point where gas is parceled out to purchasing end-use consumers. 955 F.2d at 1420-21. In *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), the Sixth Circuit dismissed arguments about the state's jurisdiction over "local distribution" using the circular reasoning that delivery of gas to consumers by a pipeline is not "local distribution" because it is "interstate transportation."

Three circuit opinions, unanimous in result but substantially different in reasoning, do not "conclusively" establish "flagrant and patent" preemption.[4] None of these courts even found the definition of "local distribution" to be clear on the face of the statute.

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[4] Like the circuit courts on which they so heavily rely, Midwestern and the amici agree only on their *conclusion* that Indiana Code § 8-1-2-87.5 is invalid. Midwestern defines the term "local distribution" only in the negative with its mantra that "local distribution" is *not* the "'last foot' into an end-user's facility." Br. 21. GPC defines "local distribution" in terms of "low pressure, local delivery systems," a definition rejected by the Tenth Circuit. GPC Br. at 6. Scepter and INDIEC argue that dormant Commerce Clause principles predominate over the statutory interpretation of the NGA that is the focus of the other briefs. Scepter Br. at 4-8 (improperly attempting to raise a constitutional challenge abandoned by Midwestern in the appeal to the Seventh Circuit, which this Court recognized as a jurisdictional bar in *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983)).

B. This Court's Opinions Do Not Support A Facially Conclusive Finding.

The Court has upheld state authority to regulate interstate pipelines' distribution of gas to end-users when the pipeline sells the gas. *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951); *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507 (1947). The Court has *not* considered states' authority to regulate interstate pipelines' distribution of gas to end-users when the sale is made by a third party. In *General Motors Corp. v. Tracy*, 519 U.S. 278, 306 n.14 (1997), the Court, after recognizing changes in the natural gas industry had resulted in the unbundling of gas sales and transportation, stated that "several Courts of Appeals have held that the NGA confers jurisdiction on FERC rather than the States, to regulate such bypass arrangements for supplying gas to large industrial consumers. . . . We express no view on the correctness of these decisions." This express reservation of the issue is the extent of the Court's guidance with respect to Midwestern's claim of preemption.

Respondent and the amici attempt to draw an analogy between the Court's recent decision in *New York v. FERC*, ___ U.S. ___, 122 S.Ct. 1012 (2002), and the jurisdictional dispute that underlies Midwestern's request for injunction and attempt to evade *Younger*. Midwestern goes so far as to claim that the opinion in *New York v. FERC* "*affirmed*" the Sixth, Tenth and D.C. Circuit decisions discussed in Part II(A) above. Of course, *New York v. FERC* did not even mention those circuit court decisions, let alone affirm them. The only similarity between those cases and *New York v. FERC* is that they involve issues concerning the limits of FERC's jurisdictional reach. Aside from illustrating the national importance of such questions, *New York v. FERC* has virtually no bearing on this case.

First, the Court recognized in *New York v. FERC* that it was *not* addressing the validity of a state law alleged to conflict with FERC's assertion of jurisdiction. *Id.* at 1023.[5] When faced with a question of whether "state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority," the Court applies a "presumption *against* preemption." *Id.* (explaining that the Court "starts with the assumption that the historical police powers of the state were not to be superseded . . . unless that was the *clear and manifest purpose* of Congress") (emphasis added). This presumption of validity was not applicable in *New York v. FERC*, but clearly applies here, counseling heavily in favor of abstention and of allowing the state the opportunity to interpret and enforce its laws.

In addition, *New York v. FERC* did not involve the state's exercise of jurisdiction over interstate pipelines (or even interstate electricity providers) engaged in a function traditionally regulated by the state. Instead, the Court addressed FERC's limited exercise of jurisdiction over local electricity utilities (in the absence of state regulation) to require those utilities to transmit competitors' electricity over their portion of the interstate "grid" on the same terms as they applied to their other customers. The federal regulation at issue, and the practices that gave rise

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[5] Midwestern's reliance on *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), is misplaced. As the D.C. Circuit recognized in *Pub. Util. Comm'n of Calif. v. FERC*, *Transcontinental* is inapposite because, in that case, no state was seeking to assert jurisdiction over the final delivery to an end-user. *Transcontinental* involved a dispute over FERC's involvement in certification of delivery of gas to an LDC, some of which was to be used by the LDC.

to it,[6] have nothing to do with this case. Certainly, *New York v. FERC* does not resolve, conclusively or otherwise, the issue of whether Midwestern's local delivery service to end use consumers is "local distribution" through "facilities for such distribution" within the meaning of the NGA.

No Supreme Court opinion provides a facially conclusive finding of flagrant and patent preemption, and a few, inconsistently reasoned circuit court opinions do not justify removing the question from Indiana's courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Ronald E. Christian
Robert E. Heidorn
Vectren Corporation
Hulman Building
20 NW Fourth Street
Evansville, Indiana 47708
(812) 491-4202

Wayne C. Turner
Counsel of Record
Anne L. Cowgur
Gregory A. Neibarger
McTurnan & Turner
2400 Market Tower
10 West Market Street
Indianapolis, Indiana 46204
(317) 464-8181

Counsel for Southern Indiana Gas and Electric Company

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[6] For a detailed comparison of the fundamental differences between the electric and natural gas industries and regulatory concerns in each area, see Peter Fox-Penner, *Electric Utility Restructuring, A Guide To The Competitive Era* (1997). One example is that electricity is not a storable commodity and, thus, the local public utilities are interdependent. All users take from a pool of electricity, "and the system is adjusted so that the total [electricity] flowing into the pool equals the total [electricity] being withdrawn by all users at every moment." *Id* at 26. This interdependence and vulnerability to rapid, large-scale interruption due to local activity is not a factor in the natural gas industry, where gas does not enter an LDC's system from one interstate pipeline and leave through a different pipeline on the other side. LDCs are the endpoint for the local distribution of gas to end-use consumers, not waypoints or interchanges on an interstate "grid."